Supreme Court, U.S.
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No.

IN THE SUPREME COURT OF THE UNITED STATES

O. BRUTON SMITH AND HELEN W. SMITH, EXECUTRIX FOR PLAINTIFF BILL SMITH, DECEASED

PETITIONERS

v.

THE UNITED STATES

RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether the Court of Federal Claims' irregular use of a Show Cause Order and Opinion to exclude *sua sponte* Petitioners' relevant affidavits, depositions and other evidence, for the purpose of granting summary judgment for Respondent on the contract issue, and summary affirmance by the Court of Appeals are in conflict with this Court's rule that "the evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in its favor." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S.Ct. 2505, 2513 (1986); Matsushita Elec. Indus. Co. v. Anos Radio Corp., 475 U.S. 574, 106 S.Ct. 1348, 1356 (1986); United States v. Diebold, Inc., 369 U.S. 654, 82 S.Ct. 993, 994 (1962).

Whether, given the trial court's finding that there was no contract as contended by Petitioners, the Fifth Amendment was then violated by the lower courts' refusal to recognize property rights created by the rule of promissory estoppel, contra to the recognition of that rule by other federal courts of appeal, as being the subject of a Fifth Amendment taking without just compensation.

CORPORATE DISCLOSURE STATEMENT

The real parties in interest are O. Bruton Smith, and Helen W. Smith, Executrix of the Estate of Bill Smith, deceased, individually and North Carolina Federal Savings and Loan Association (Old NCF), a defunct corporation, represented derivatively by the individual Petitioners. NCF Financial Corporation, which acquired all of the stock of New NCF in 1988 as a holding company, a defunct corporation, is also represented derivatively.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

OPINIONS BELOW

The opinion, order and judgment of the United States Court of Federal Claims App.A2-A33 are reported at 58 Fed. Cl. 374 (2003), 2003 U.S. Claims LEXIS 301 (2003).

The decision of the Court of Appeals for the Federal Circuit is reported at *Smith v. United States*, 110 Fed. Appx. 898, 2004 U.S. App. LEXIS 22024 (2004), and the Court's Order denying rehearing is reported at *Smith v. United States*, 2004 U.S. App. LEXIS 2754 (Fed. Cir. Dec. 14, 2004)

JURISDICTION

Jurisdiction of the Court of Federal Claims was invoked under 28 U.S.C. § 1491 and the Fifth Amendment of the United States Constitution. The Court of Federal Claims opinion was entered October 22, 2003. The Court's Judgment granting the United States summary judgment on all claims for breach of Petitioners' contract with the United States and the taking of Petitioners' property without just compensation was entered October 23, 2003. Notice of Appeal was duly filed December 3, 2003. App.A41. Jurisdiction of the Court of Appeals for the Federal

Circuit was invoked under 28 U.S.C. § 1295 (a)(3). The appeal was docketed in the Court of Appeals for the Federal Circuit on January 23, 2004 as number 04-5046. The Court of Federal Appeals entered judgment under its Rule 36, summarily affirming the court below on October 6, 2004. App.A42-A43. Petitioners timely filed a petition for re-hearing on the 18th day of November, 2004. The Court of Appeals denied re-hearing December 14, 2004. App., A37-A40. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISIONS AND RULES INVOLVED

Amendment V of the Constitution provides:

"No person shall...be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Court of Federal Claims Rule 56 provides:

> (c) The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.
> (d) If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or the

> relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

Court of Federal Claims Rule 17 (a)(b) provides:

(a) Real Party Interest. Every action shall be prosecuted in the name of the real party in interest. An executor, administrator, guardian, bailee, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by statute may sue in that person's own name without joining the party for whose benefit the action is brought. No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder, or substitution shall have the same efec as if the action had been commenced in the name of the real party in interest.

(b) Capacity to Sue or be Sued. the capacity of an individual, other than one acting in a representative capacity, to sue or sued shall be determined by the law of the individual's domicile. The capacity of a corporation to sue or be sued shall be determined by the law under which it was organized. In all other cases capacity to sue or be sued shall be determined by the law of the applicable state, except (1) that a partnership or other unincorporated association which has no capacity by the law of its state may sue or be sued in its common name for the purpose of enforcing for or against it a substantive right existing under the Constitution or laws of the United States, and (2) that the capacity of a receiver appointed by a court of the United States to sue or be sued in a court of the United States is governed by Title 28, U.S.C., Sections 754 and 959(a).

STATEMENT

1. The Underlying Facts.

A. Claims for breach of contract.

Petitioners as Plaintiffs filed this "*Winstar*-related" case in 1992. It involves Congress' passage of the Financial Institutions Reform, Recovery and Enforcement Act of 1989 ("FIRREA") and the Act's repudiation of the government's contractual supervisory goodwill forbearance determined by the GAAP "Purchase Method" in the amount of approximately $15,000,000, amortizable for 40 years. This contractual forbearance was the consideration for rescue of the failing Carolina Federal Savings and Loan Association by Petitioners and other shareholders of Old NCF. Petitioners, as Plaintiffs below, sought restitution for material breach and repudiation of their contract with the Federal Home Loan Bank Board ("FHLBB"). The *quid pro quo* for FHLBB's goodwill forbearance was the contribution of all the assets of Old NCF to CFS and the acquisition of all shares of the failing CFS by Petitioners and the other shareholders of Old NCF. The CFS shares thus acquired would have been worthless without the contractual goodwill forbearance. This agreement remained in place from June 1982 until repudiated by the passage of FIRREA in 1989. If the forbearance had not been contractual by the government, and could have been withdrawn a short time after acquisition of CFS by Petitioners and the other shareholders of Old NCF, CFS would have been rendered in non-compliance with regulatory capital requirements to the extent of about $15,000,000, and its shares would have been worthless.

B. Derivative Claims.

Petitioners also asserted derivative claims for breach of contract as stockholders of Old NCF. Old NCF negotiated and was a party to the contract, and its charter was dissolved after transfer of its assets to CFS. No receiver was appointed for Old NCF. A receiver was appointed for CFS (New NCF) after FIRREA's repudiation of the goodwill forbearance contract. Petitioners do not here purport to exercise any right based simply upon ownership of CFS shares.

C. Takings Claims.

Alternatively, Petitioners alleged claims for the government's taking without compensation of Petitioners' property and rights arising by promissory estoppel and justifiable reliance upon inducement by FHLBB. The Old NCF stockholders, including Petitioners, materially and detrimentally changed their position in reliance upon FHLBB's offer when they voted the acquisition of Old CFS' shares and dissolution of their own corporation, Old NCF, and contribution of all its assets to CFS.

D. The Contract.

The merger application, approved by Petitioners by vote and FHLBB by Resolution 82-391, included affidavits which affirmed:

> . . . 4. Carolina Federal will not furnish any consideration associated with the purchase . . .of its stock. . . . 9. The fair market value of the Carolina Federal capital stock to be received by each shareholder of North Carolina Federal who does not perfect his dissenters' rights will be approximately equal to the fair market value of the North Carolina Federal capital stock in exchange therefor. . . . 11. North Carolina Federal, Carolina Federal and their shareholders will each pay their own expenses, if any, incurred in the proposed transaction; and The basis of the Carolina Federal stock to be received by the shareholders of North Carolina Federal will, in each instance, be the same as the basis of the respective shares of North Carolina Federal stock. App.A55-A57.

CFS had a negative asset balance of about $15,000,000, and Old NCF had a positive asset balance of about $15,000,000. Without the agreement for a supervisory goodwill forbearance of about $15 million amortizable for 40 years, these official affidavits would have been specious to the knowledge of FHLBB and Petitioners. This disaster for FHLBB's plans was avoided in that the proxy statement,

included in the Application and given to Petitioners as ordered by FHLBB, provided the negotiated terms of the offered agreement in stipulating:

> [T]he merger will be accounted for as a 'purchase...the identifiable intangible assets, which approximate $837,000 will be amortized by charges to operations over a period of 6-25 years on accelerated and straight lines. The unidentifiable intangible asset, which approximates $14,012,000 assuming the merger had occurred on March 31, 1982, will be amortized by charges to operations over a period of 40 years using the straight line method of amortization. App.A48.

FHLBB Resolution No. 82-391 (App.A50-A51) required that all conditions be completed one condition was that these stipulations be communicated to the shareholders for approval and assent by vote. The shareholders of Old NCF, including Petitioners, assented, approved, and performed all stipulated conditions necessary to complete the "merger."

2. The Federal Claims Court Proceedings.

The Show Cause Order ("Order Addressing all Pending Motions") entered *sua sponte* by the trial court on February 25, 2003 directed Petitioners to file a "Joint Appendix" composed of "transactional documents," thus excluding depositions, affidavits, related letters, memoranda, documents and orders of federal regulators evidencing Petitioners' contract for the stipulated goodwill, and to show cause in ten pages based only on "transactional documents" why the government's motion for summary judgment should not be granted. Petitioners filed their "Ten Page Response," and the Joint Appendix, on July 31, 2003. Petitioners' Response reserved the right to rely upon any other relevant and material evidence not included in the order. Thereupon and without a hearing or oral argument on the government's motion for summary judgment, the trial court entered the Opinion and Order of October 22, 2003 and Judgment of October 23, 2003 granting summary judgment dismissing Petitioners for lack of standing. The

dismissal was based in important part upon the Opinions' finding that Petitioners were not signatories to the goodwill contract.

A. Relevant evidence excluded from consideration by the Show Cause Order and the Opinion included:

(1) Petitioner O. Bruton Smith testified on his discovery deposition, October 28, 1999, as follows:

> Q. You just told me about 40 years. Can you tell me what Mr. Goodwin [President of Old NCF] and the person from Peat Marwick [Old NCF's accountants] told you about goodwill itself?
>
> A. That we could write all the loans down to market, create the goodwill whether it be 20 million or 30 million or whatever it was and then we write – and then the goodwill is created and then you write that off over a 40-year period. [Emphasis added.]

(2) Paragraph 8 of the Affidavit of O. Bruton Smith, March 8, 1998, states an obvious truth: "[T]o do the acquisition of Carolina Federal and the merger without the stipulated supervisory goodwill forbearance would have had a disastrous effect upon the adequacy of regulatory capital and would have destroyed the value of their [the shareholders'] stock." App.A54.

(3) Plaintiff Bill Smith testified in his *de bene esse* deposition that:

> A. . . .If it hadn't been for the $14 million and the 40 years I would have never voted for the merger.
>
> Q. You relied upon the $14 million and 40 years amortization
>
> A. Yeah, that's right. App.A66.

(4) Bill Smith Deposition 14:4-24:

> Q. And what do you mean, blue sky?
>
> A. Well, the $14 million they was going to give us, and he called it creative financing, they were going to give us to take over that savings and loan, to take that troubled institution and the amortized goodwill over 40 years, you know. App.A63.

(5) Bill Smith further testified in his discovery deposition 99:9-19, 100:21-22: "That's a contract as far as I'm concerned." App.60

(6) Petitioners expert value witness, Bryan H. Jones, testified on his discovery deposition that all stock in Old NCF, as a going business (prior to the merger) had a total fair market value of $22,300,150. Deposition of Bryan H. Jones, Vol. I, P162. App.A81.

(7) FHLBB Chairman Richard T. Pratt (1981-82) testified at App.A71-A78.:

"If interest rates in '82 remain about where they are—and without factoring in industry restructuring—some 400 associations will exhaust their capital accounts. Continuation of these rates through 1983 would result in another 500 institutions in this condition." Common Deposition of Richard T. Pratt in *Plaintiffs in All Winstar-Related Cases v. United States*, No. 90-8C *et al.*, December 2, 1998, at 106:10-15. Liquidation of all insolvent thrifts in 1981 could not have been accomplished without "the bankruptcy of FSLIC." *Id.* at 29-30. The acquiring institutions that merged with failing thrifts were thus providing a "service to the FSLIC and the FHLBB and the service was indispensable." *Id.* at 99:11 – 100:7.

"FHLBB in unassisted supervisory mergers had whatever role they desired. So the senior staff and the Bank Board could have a major influence on an unassisted merger through a myriad of avenues." *Id.* at 100:8-21. "The Bank Board could have allowed and instructed the institution to use generally accepted accounting

principles, which would result in goodwill under the GAAP application." *Id.* 16:4-9. If the merger resulted in goodwill, it would be the expectation of the Bank Board that the merger partners could rely upon that goodwill for the amortization period specified. It was Chairman Pratt's opinion that they could. *Id.* at 16:10-17.

"Regulatory documents concerning the Old NCF merger chronicle one of those supervisory mergers which may indeed be relatively typical." *Id.* at 8:22- 9:1-3. The program created by Chairman Pratt and Mr. Beesley and others was successful and assisted in reducing the cost of resolution to the FSLIC funds. *Id.* at 80:14-17.

"Plaintiffs were not automatically entitled to GAAP accounting. GAAP was a change in the regulations made by FHLBB so that it could be used to induce supervisory acquisitions which were a new program of Chairman Pratt to promote the rescue of failing S&L's. GAAP could be **offered as part of a negotiated acquisition**. The acquiring institutions probably would have been reluctant to acquire the troubled institution without immediate benefit that was created by FHLBB." *Id.* at 43, line 21, to 44, line 3 (emphasis added). App.A75.

(8) The letter of David S. Goodson, Jr., Supervisory Agent, to H. Clark Goodwin, President, NCF, dated May 3, 1982, requires "[C]ancellation of North Carolina Federal Savings and Loan Association charter, certificate of insurance and certificate of membership in the Federal Home Loan Bank of Atlanta . . .," *i.e.*, Old NCF's stockholders acquired CFS' stock, and CFS acquired Old NCF's assets, not its charter. Cancellation of Charter also was required by April 23, 1982, Letter of Carl O. Kamp, Jr., Principal Supervisory Agent, to Clark Goodwin. App.A44-A46.

(9) The Agreement (of merger) in the Application dated December 29, 1981 in ¶ 2.3 stipulated the merger would become effective only when "(ii) **all conditions precedent** . . . **have been satisfied** and, (iii) the Bank Board shall declare the Merger effective. . . . NCF . . . shall prepare a . . . Proxy Statement . . . to . . . shareholders . . . ." (emphasis added). App.A80. Old NCF by its President (and shareholder) accepted by executing the Agreement in

the Application approved by FHLBB and accepted all FHLBB's terms subject to the express condition precedent of the stipulated "shareholder approvals to the merger." (Emphasis added). App.A79-A80. The shareholders of Old NCF accepted by performing all their "conditions precedent."

(10) Negotiations leading to contract are memorialized in FHLBB memos and correspondence. The Memo from Deputy Director FHLBB to Robert J. Moore and Harry M. Zimmerman, Associate General Counsel, dated May 20, 1982, states:

> OES's current position is that 40 years is considered unacceptable without a detailed analysis which supports the use of a 40 year amortization period. The association's independent accountant indicated that the association could justify the 40 year amortization period and that the supporting information would be forwarded immediately. App.A48-A49.

(11) The Memo of Robert J. Moore to Harry M. Zimmerman, Jr., FHLBB Associate General Counsel, dated May 26, 1982, states that based on "the additional information referred to in Peat, Marwick, Mitchell & Co.'s (PMM&Co.) letter dated May 20, 1982, and detailed discussions with Mr. Wallace Edge, PMM&Co. partner, we conclude that the proposed merger application is in substantial compliance with OES's SP-24 and Generally Accepted Accounting Principles." App.A49-A50.

(12) The Memo of Thomas P. Vartanian, FHLBB General Counsel, to J.J. Finn, FHLBB Secretary, April 26, 1982, used contract terminology in noting that "the **terms** of the proposed transactions are fair to the stockholders of their respective associations . . ." (emphasis added). App.A50-A51. The "terms" of the transaction offered Old NCF stockholders would manifestly not have been "fair" to NCF or NCF's shareholders absent the contractual nature of the "terms" of the forbearance, *i.e.*, the stockholders would have contributed millions of dollars in assets to the failing CFS with a $15,000,000 negative net worth, resulting in

acquisition of a "surviving" thrift that could have been rendered deficient in regulatory capital immediately after merger.

The memo of Vartanian stated:

> According to the preliminary **proxy material filed with the Board**, . . . assuming that Carolina Federal continued to incur additional losses at the same rate, Carolina Federal's net worth will be depleted during the latter part of 1982. . . .There is currently no active trading market for Carolina Federal's shares. (Emphasis added) App.A79-A80.

B. Findings

The Court of Federal Claims made the following specific findings that materially conflict with the excluded evidence:

(1.) "As a part as the merger negotiations, Old NCF sought assurances from the FHLBB and FSLIC in the form of favorable accounting treatment. In particular, Old NCF wanted the ability to count so-called supervisory goodwill, the difference between CFS' purchase price and its fair market value towards its regulatory capital requirements. Old NCF viewed the accounting treatment of supervisory goodwill as a critical factor in the merger's overall success. After approving the accounting treatment for the merger, the FHLBB proceeded with the transaction and allowed Old NCF to record supervisory goodwill as a capital asset on the books of the surviving corporation. The FHLBB, as was usual in *Winstar* cases, also allowed the emerging entity to amortize such goodwill over forty years." (Emphasis added) App.A8.

Conflicting Evidence: "40 years is unacceptable without a detailed analysis." Memo from Deputy Director FHLBB to Robert J. Moore and Harry M. Zimmerman, Associate General Counsel, dated April 20, 1982. App.A48.

(2.) Opinion: "As part of the merger, Old NCF purchased all of CFS's outstanding common stock at a cost of $905,000. Old NCF then merged into CFS, but CFS remained a surviving corporation.

Old NCF shareholders engaged in one-for-one exchange for shares of CFS. CFS adopted Old NCF's charter and bylaws, and changed its name to North Carolina Federal and Loan Association ("New NCF"). The shareholders then met and voted in favor of the merger, thereby ratifying New NCF as the emerging entity." (Emphasis added). App.A9.

Conflicting Evidence: The Plan of Merger in the Application, § 2.3, required first approval by shareholders vote then execution of the documents. App.A80-A81.

(3.) Opinion.: "Critical to the issue of privity of contract, Defendant points to the Smiths lack of participation in the regulatory approval of the Old NCF/CFS merger. Indeed the Smiths are neither mentioned in the relevant documents Old NCF submitted to the FHLBB as part of the merger, nor are they signatory's to these documents...in fact, the only mention of the Smiths, according to Defendant results from the Proxy statement Old NCF issued to them prior to the merger...'nothing in the proxy statement remotely suggests that regulators intended to enter into a contract with either shareholders or the thrift-much less the shareholders.'" (Emphasis added). App.A16.

Conflicting Evidence: Petitioners were included in every reference to "shareholders" of Old NCF. This included conditions concerning voting, transfer of assets to CFS, and acquisition of all shares of the failing CFS by shareholders of Old NCF.

(4.) "The uncontested facts in the record do not indicate the government regulators either intended to negotiate directly with the Smiths, or actually did negotiate directly with the Smiths." (Emphasis added)

Conflicting Evidence: The omitted evidence discloses that FHLBB's offer could be accepted only by vote and action of shareholders of Old NCF and was thus accepted.

(5.) "It is now well-established in this circuit that only parties to an agreement and in the context of Third-Parties, such as

shareholders that usually means signatories, may sue for direct breach of contract." (Emphasis added) App.A18.

Conflicting Evidence: Old NCF shareholders formed a unilateral contract by voting, transferring assets and acquiring Old CFS. General rules of contract law apply. *See Winstar Corp. v. United States*, 64 F.3d 1531 (Fed. Cir. 1995) (*en banc*), *Aff'd* U.S. 116 S.Ct. 2432 (1996).

(6.) "The Smith Plaintiffs' second so-called derivative claim is not at all about the loss of value of NCF shares as they contend, but really about recoupment of their personal $28 (sic) million contribution of the Old NCF/CFS merger. Clearly it is not a derivative claim at all because the $28 (sic) million in shareholder equity represents contributions from individual shareholders. Any claim for loss of investment value belongs solely to these shareholders as individuals not to all shareholders of the corporation or the corporation as a *de jure* entity." App.A24.

Conflicting Evidence: All evidence shows Petitioners have standing as real parties in interest on their own claim and also as representatives on Old NCF's derivative claim. See CFC 17 (a)(b)

(7.) "The Court rejects both of the Smiths takings arguments because the Smiths, as shareholders, simply have no standing to bring a takings claim under the facts of this case. The law of this Circuit is clear: What was taken by the government here was not the thrift or the shares, but the contractual right to use supervisory goodwill as an asset and for amortization of the asset." App.A28.

Conflicting Evidence: The rule of promissory estoppel is recognized by courts of appeal in other circuits. Petitioners had evidence of an alternative claim based on the rule of promissory estoppel and the taking of the property created by that widely recognized rule.

3. The Court of Appeals Decision.

The Court of Appeals summarily affirmed the Trial Court without opinion pursuant to its rule 36. App.A1. That affirmance necessarily affirmed the far reaching error noted above in the questions presented for which review is sought.

REASONS FOR GRANTING THE PETITION

A. The courts below have radically truncated mandatory fairness standards for resolving motions for summary judgment.

The trial court's unauthorized use of a Show Cause Order and its affirmance in the Court of Appeals strongly challenge the continuing validity of an important rule of practice established by this Court. The trial court's procedure also is not sanctioned by Rule 56 of the rules of civil procedure. A denial of review by this Court would clearly signal availability of show cause orders as acceptable alternatives to the more just and wise procedure required by this Court.

The trial court's assumed power to invent the order in question has even now been cited with apparent approval in at least these two later cases: *Pueblo of Laguna v. United States*, 60 Fed. Cl. 133, 136, 2004 U.S. Claims LEXIS 49 (2004); *Eagle Design & Management v. United States*, 62 Fed. Cl. 106, 108, 2004 U.S. Claims LEXIS 244 (2004).

The Show Cause Order is an invention because "[o]rders to show cause and rules nisi are not provided for in the Federal Rules of Civil Procedure." *5 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure* (2d ed. 1990) § 1195.

Improper use of the Show Cause Order vitiates all the trial courts determinations. The *sua sponte* exclusion of Petitioners' evidence presents an important issue. In *Foucha v. Louisiana*, 504 U.S.71, 112 S. Ct. 1780, 1783 (1992), this Court said that "[b]ecause the case presents an important issue and was decided by the court below in a manner arguably at odds with prior decisions of this Court, we granted *certiorari*." In the case at bar an important issue was presented and clearly decided at odds with prior decisions of this

Court regarding the requirement for giving due effect to evidence favorable to non-movant in deciding summary judgment motions.

The Show Cause Order and Opinion conflict with the decisions of this Court governing summary judgment that "evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in its favor." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S.Ct. 2505, 2513 (1986); Matsushita Elec. Indus. Co. v. Anos Radio Corp., 475 U.S. 574, 106 S.Ct. 1348, 1356 (1986); United States v. Diebold, Inc., 369 U.S. 654, 82 S.Ct. 993, 994 (1962). In its affirmance of the lower court's repudiation of this Court's rule, the Court of Appeals for the Federal Circuit "has so far departed from the usual course of proceedings, or has so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision." Supreme Court Rule 10(a)(b). The courts below have *sua sponta* initiated a drastic and potentially far reaching change in the rules of practice and procedure, which should not go unnoticed by this Court.

The Court of Appeals' summary affirmance necessarily affirmed an important change in federal practice that conflicts with decisions of this Court.

Petitioners did not have to sign the contract to make it enforceable. "It is well understood that a contract may be unilateral; that is, that only one party makes a promise. The consideration for the promise is some non-promissory performance rendered by the promisee...." J. Perillo, *Corbin* § 1.19, p. 59 (rev. ed. 1993) "For example, an offer...will become a contract when what is requested is given or done, though no obligation to give or do anything ever exists." 1 *Williston on Contracts* § 1:17 at 45 (4th ed. 1990). Old NCF's shareholders before merger accepted FHLBB's offer and promise of the stipulated supervisory goodwill forbearance by the required vote which transfers Old NCF's assets to CFS, by consummating the merger, and by acquiring CFS's shares. The unilateral contract was thereby completed.

"[C]onsistent with the notion that assent is to [be] judged objectively, the law properly construes both acts and words as having the meaning which a reasonable person present would ascribe

them in view of the surrounding circumstances." 1 Samuel Williston and Richard A. Lord, *A Treatise on the Law of Contracts* (4th ed. 1990), § 4:12. Judged objectively, the shareholders of Old NCF, including Petitioners, reasonably believed FHLBB offered them an agreement in exchange for their vote for transfer of value to CFS, which they completed as specified.

The essence of the terms of the transaction negotiated by FHLBB were to provide regulatory incentives to encourage specifically identified investors to capitalize CFS. The regulators offered specific incentives, negotiated by them, which were intended to, and did, induce the stockholders of Old NCF to assent by their vote and their act in infusing new capital and assuming control of CFS. Petitioners may recover for restoration of the value of net worth passed in a merger, the value of what they gave up. *See Glendale Fed. Bank v. United States*, 239 F.3d 1374, 1380-81 (Fed. Cir. 2001) (discussion of restitution of capital contribution).

B. **As an alternative to privity by contract, Petitioners had standing on their "takings claims."**

Petitioners, as an alternative to contract, alleged claims for the United States' taking of property created by the United States' promises and Petitioners' actions in justifiable reliance. In *Porter v. Commissioner of IRS*, 60 F.2d 673 (2d Cir. 1932), Judge Learned Hand quoted with approval from *Williston on Contract*, § 140, that "'Promissory estoppel is now recognized as a species of consideration.'" In *Allied Equp. Co. v. Weber Eng. Prod.*, 237 F.2d 879, 882 (4th Cir. 1956), the Fourth Circuit recognized the doctrine of promissory estoppel: "On this first question we hold therefore that, if, pursuant to an understanding with Weber, Allied expended sums of money in developing a distributorship system for Weber products throughout Virginia, it was entitled to the right of distributorship".

The Courts finding that "any claim for a loss of investment value belongs solely to the shareholders as individuals..." supports Petitioners claims for a taking. Clearly, Petitioners are the real parties in interest on that claim. The opinion arrives at the novel

conclusion that Petitioners lack privity even in the face of facts showing they are real parties in interest.

The opinion defines privity as "the 'connection or relationship between two parties each having a legally recognized interest in the same subject matter (such as a transaction, proceeding, or piece of property)...'" Black's Law Dictionary, 1272 (Brian A. Garner ed., West Group 7th ed. 1999) (1933). By the Opinion's own finding, Petitioners rights and interests are inextricably bound up and intertwined with the entirety of the transaction involving CFS, Old NCF, FHLBB, a supervisory-goodwill forbearance, and the issue of who has rights in any recovery. This is "privity."

Promissory estoppel was similarly applied in *Clausen & Sons, Inc. v. Theo. Hamm Brewing Co.*, 395 F. 2d 388 (8th Cir. 1968) (when "promisor should reasonably have expected its promise to induce another's detrimental action"), and in *Allen M. Campbell Co. v. Virginia Metal Indus.*, 708 F.2d 903, 931 (4th Cir. 1983) ("promissory estoppel...allows recovery even in the absence of consideration"). *See also* 1 *Farnsworth on Contracts*, §§ 1.8, 2.19 and 3.2 (2d ed. 1998).

The Court in *Securities Savings & Loan Ass'n v. Director, Office of Thrift Supervision*, 960 F. 2d 1318, 1323 (5th Cir. 1992), a *Winstar*-related case, held: "Like the Sixth and Ninth Circuits, we find that 'if a taking of property rights occurred, 'the evidence of congressional intent is strong enough to infer that Congress wanted to effect a taking.'" The decision of the Court of Appeals in this case conflicts with decisions of other courts of appeals cited above.

CONCLUSION

The petition for a writ of *certiorari* should be granted. The decisions of the Court of Federal Claims and the Court of Appeals conflict with decisions of this Court, with other courts of appeals, and with Article V of the Constitution.

Respectfully submitted,

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041243 MAR 11 2005

OFFICE OF THE CLERK

No.

IN THE SUPREME COURT OF THE UNITED STATES

O. BRUTON SMITH AND HELEN W. SMITH, EXECUTRIX FOR PLAINTIFF BILL SMITH, DECEASED

PETITIONERS

v.

THE UNITED STATES

RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

APPENDIX

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Filed U.S. Court of Appeals
for the Federal Circit
Oct-6 2004
Jan Horbaly Clerk

NOTE: Pursuant to Fed. Cir. R. 47.6, this disposition is not citable as precedent. It is a public record.

United States Court of Appeals for the Federal Circuit

04-5046

O. BRUTON SMITH and
HELEN W. SMITH, Executrix for Plaintiff Bill Smith, Deceased,

Plaintiffs-Appellants,

and

FEDERAL DEPOSIT INSURANCE CORPORATION,

Plaintiff,

v.

UNITED STATES

Defendant-Appellee.

Judgment

ON APPEAL from the UNITED STATES COURT OF FEDERAL CLAIMS

in CASE NO(S). 92-540C

This CAUSE having been heard and considered, it is ORDERED and ADJUDGED:

Per Curiam (CLEVENGER, DYK, and PROST, Circuit Judges).

AFFIRMED. See Fed. Cir. R. 36.

ENTERED BY ORDER OF THE COURT

DATED Oct-6 2004

/s/ Jan Horbaly
Jan Horbaly, Clerk

IN THE UNITED STATES COURT OF FEDERAL CLAIMS
No: 92-540C

October 22, 2003

O. BRUTON SMITH and HELEN W. SMITH, Executrix for Plaintiff Bill Smith, deceased,

Plaintiffs,

and

THE FEDERAL DEPOSIT INSURANCE CORPORATION,

Plaintiff-Intervenor,

v.

THE UNITED STATES,

Defendant.

Winstar-Related Case; Privity of Contract; Shareholder Derivative Standing; Fifth Amendment Takings; FDIC Standing

Gaston Gage, Parker, Poe, Adams & Bernstein, Charlotte, North Carolina, argued for the plaintiff.

John F. Elmore, Receivership Goodwill Section, FDIC Legal Division, Federal Deposit Insurance Corporation, argued for the plaintiff-intervenor.

Gregory R. Firehock, Commercial Litigation Branch, Civil Division, United States Department of Justice, argued for the defendant.

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OPINION AND ORDER

Block, *Judge.*

This is a *Winstar*-related case. The issue addressed in this decision is that of standing to sue. Far more than a "mere technicality," the doctrine of standing goes to the heart of the constitutional separation of powers because it defines the contours of the judicial power. It "serves to identify those disputes which are appropriately resolved through the judicial process." *Whitmore v. Arkansas*, 495 U.S. 149, 155, 110 S. Ct. 1717, 1722 (1990). It is through such mechanisms as standing that federal judicial power is limited, at times helping federal courts over the years live up to their appellation as the "least dangerous" of the branches of government.[1]

Plaintiffs O. Bruton Smith and Bill Smith (now deceased, but represented by his executrix, Helen W. Smith) were shareholders of North Carolina Federal Savings and Loan Association ("NCF"), a thrift that allegedly failed because it could not fulfill federal regulatory capital requirements in the wake of enactment of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. L. No. 101-73, 103 State. 183 ("FIRREA"). The Smiths filed suit against the United States, asserting a *Winstar* breach of contract claim by contending that NCF failed as a result of FIRREA's prohibition against counting supervisory goodwill toward its regulatory capital requirement.

Particularly, the Smiths contend, *inter alia*, that they and the other NCF shareholders relied to their detriment on the promise

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[1] *See* Alexander Bickel, THE LEAST DANGEROUS BRANCH (19_) (arguing that such judicial devices as standing should be employed to avoid controversial political issues). The characterization of the judiciary as the "least dangerous branch" was derived from the *Federalist Papers*. *See also* THE FEDERALIST No. 78 (Cooke ed. 19_) at_. ("[I]n a government in which [the branches] are separated from each other, the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution.... It may truly be said to have neither FORCE nor WILL, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.")(Alexander Hamilton writing as *Publius*).

made by the federal banking regulators to allow the use of supervisory goodwill to offset regulatory capital requirements and to amortize this new and strange specie of goodwill over an extended period. Accordingly, the Smiths maintain that they and other shareholders were duped into approving the 1982 merger of NCF with another thrift. The Smiths contend the government's adoption of FIRREA was both the actual and proximate cause of the loss in value of their shares and assert both a personal and a derivative claim.

The Federal Deposit Insurance Corporation ("FDIC") intervened in this action as a plaintiff, and represents the interests of now-defunct NCF pursuant to its status as receiver. The FDIC contends that the government's adoption of FIRREA breached its agreements with NCF regarding supervisory goodwill. The FDIC asks that the court declare the provisions of FIRREA and subsequent actions of federal regulators constitute a "repudiation, breach, and abrogation" of the FDIC's contract rights, and a compensable taking under the Fifth Amendment to the United States Constitution." Compl. in Intervention of Pl. FDIC at 10.

The Smiths commenced this action on July 7, 1992. The FDIC received permission to intervene on March 27, 1997. The case, subject to the general *Winstar* Omnibus Case Management Order promulgated by then Chief Judge Smith on September 18, 1996,[2] was subsequently transferred to two judges of this court. During this time, the parties filed a multitude of discovery documents and records, a tangle of discovery motions, defendant's motion to dismiss for lack of jurisdiction (in which the government avers that both plaintiff Smiths and intervenor FDIC lack standing), and cross motions for summary judgment.

After another transfer to the present judge, the court, slicing through the Gordian Knot of pending motions and cross motions, issued an Order to Show Cause ("OSC") on July 17, 2003. In the

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[2] *See* Omnibus Case Management Order, Nos. 90-8 C, et al., *Plaintiffs in all Winstar-related Cases at the Court v. United States*, September 18, 1996.

intervening years since the complaint was filed and the FDIC intervened, both the Federal Circuit and the Court of Federal Claims addressed the issue of whether a shareholder who claims to be harmed by the loss of supervisory goodwill engendered by the enactment of FIRREA has standing to sue in a *Winstar*-type case. Likewise, these courts confronted the standing issue arising from the anomaly whereby a creature of the United States – here the FDIC – sues the United States and seeks damages to be paid to the United States. By-and-large, the courts concluded that in neither circumstance is standing to sue present.

Consequently, in the order this court asked the Smith plaintiffs and plaintiff-intervenor FDIC to articulate why this court should not dismiss their claims for lack of standing in light of the relevant court decisions including, but not limited to, *Hansen Bancorp v. United States*, 66 Fed. App. 849, 2003 WL 21267457 (Fed. Cir. Jun 2, 2003), *Admiral Financial Corp. v. United States*, 329 F.3d 1372 (Fed. Cir. 2003), *Castle v. United States*, 301 F.3d 1328 (Fed. Cir. 2002), *Glass v. United States*, 258 F.3d 1349 (Fed. Cir. 2001), *Landmark Land Co. v. United States*, 256 F.3d 1365 (Fed. Cir. 2001), and *La Van v. United States*, 56 Fed. Cl. 580 (2003).

After review of supplemental briefing addressing the OSC, and for the reasons fully stated below, this court concludes that O. Bruton Smith, Helen W. Smith, and the FDIC each lack standing to assert claims against the United States. As a result, with a lack of standing by the parties, judgment should be entered in favor of the defendant.

Background

The facts below, unless otherwise noted, are undisputed and are in part derived from the Smiths' second amended complaint, the defendant's motions to dismiss the Smiths for lack of standing, and the parties' responses to this court's July 17, 2003 OSC. They are offered to present useful background and to highlight the issue of the standing of the Smiths and the FDIC to prosecute this action.

As stated, this is a *Winstar*-related case. As a consequence of the Great Depression, the Home Loan Bank Board Act of 1932[3] was enacted to spur savings and loan associations, also known as thrift institutions, to promote personal savings and to assist consumers in purchasing their own homes, thereby improving the material comfort of average Americans and stimulating the economic vitality of the nation. Thrift institutions primarily accomplished this task by providing low interest rate loans to acquire home mortgages.

The thrifts were fairly successful and profited accordingly until the so-called savings and loan crisis of the late 1970's and early 1980's. The crisis was precipitated by high interest rates, coupled at times with managerial misfeasance or even malfeasance, which jeopardized the financial well-being and even the existence of the many thrift institutions. Saddled with traditional, low-interest-bearing home mortgage loans and fettered by the inability by law to diversify, thrifts had to pay high interest rates to compete for short-term deposits. *Winstar Corp. v. United States*, 518 U.S. 839, 845 (1996). The result was that the cost of liabilities quickly exceeded the thrifts' income from their long-term, low-rate home mortgages. *Id.* As a result, more than 400 thrifts declared bankruptcy between 1981 and 1983, threatening to exhaust the insurance fund of the Federal Savings and Loan Corporation ("FSLIC"), which insured the thrifts' depositors. *Id.* at 846-47.

In response to that crisis, the Federal Home Loan Bank Board ("Bank Board"), the federal regulatory agency responsible for regulating federally-chartered savings and loans, encouraged healthy thrifts and outside investors to purchase insolvent thrifts in a series of "supervisory mergers." *Id.* at 847. To induce those mergers, the Bank Board offered certain financial incentives, the most important being the accounting treatment of "supervisory goodwill," a term for the difference between the market value of the acquired entity's liabilities and assets. *Id.* at 848-50. As part of this inducement, the

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[3] 12 U.S.C. § 1442 *et seq.*

Bank Board permitted the acquiring thrifts to count supervisory goodwill toward their reserve capital requirements, often to be amortized over a long period of time, thus allowing thrifts to appear more profitable than they were in reality. *Id.* at 850 -53.

Not satisfied with the progress to date, Congress stepped in and passed FIRREA. Enacted in 1989, FIRREA in essence fired the thrift regulators by abolishing the Bank Board and FSLIC, establishing the Office of Thrift Supervision ("OTS") as the new thrift regulatory agency, and transferred the responsibility to insure thrift deposits to the Federal Deposit Insurance Corporation ("FDIC"). FIRREA also created the Resolution Trust Corporation ("RTC") to close and liquidate the assets of certain failed thrifts. Significantly, FIRREA further mandated that thrifts maintain a set minimum capital requirement and prohibit the use of supervisory goodwill. *Id.* at 857.

Scores of lawsuits were filed challenging FIRREA under various theories including breach of the contracts promising particular regulatory treatment. *Id.* at 858-59. Thereafter, the United States Supreme Court in *Winstar* held that enactment of FIRREA breached the various existing agreements between certain Savings and Loan Thrift Institutions and their federal regulators providing for the supervisory mergers. *Id.* at 859-60. This decision further opened the flood-gates of litigation that collectively sought hundreds of millions of dollars in damages. All of this proves the sagacity, indeed, the prescience, of Abraham Lincoln, who observed that "[l]egislation and adjudication must follow, and conform to, the progress of society."[4]

Proving Lincoln once again a prophet, the so-called *Winstar* cases similarly led to significant developments in the ancient law of contracts, as well as a refinement of certain aspects of the law of federal jurisdiction, such as the doctrine of standing. Indeed, the present case is an example of the latter.

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[4] Abraham Lincoln (1809-1865). President of the United States, 1861-65. Notes of argument in law case, June 15, 1858, reprinted in 2 COLLECTED WORKS OF ABRAHAM LINCOLN 459 (Rutgers University Press (1953, 1990)).

In 1982, Carolina Federal Savings and Loan Association ("CFS"), a Raleigh, North Carolina thrift, nearly collapsed from the savings and loan crisis of the early 1980's. CFS sought help from the federal government hoping to stave off its demise and liquidation. In response, the Federal Savings and Loan Association Corporation ("FSLIC") and the Federal Home Loan Bank Board ("FHLBB") actively pursued solvent thrifts that could merge with CFS and restore its profitability. Both the FSLIC and the FHLBB preferred a merger to liquidation because the FSLIC could be obligated to pay CFS' creditors and depositors millions of dollars from the FSLIC's insurance fund.

In its quest for viability, CFS turned to North Carolina Federal Savings and Loan Association ("Old NCF") of Charlotte, North Carolina. Old NCF, however, approached the merger negotiations with a certain degree of trepidation. Its board and major shareholders were concerned that a merger could materially undermine Old NCF's financial viability. As a result, Old NCF began the merger negotiations with the primary goal of finding a way to preserve its solvency and shareholder value.

The 1982 CFS-Old NCF Merger

As a part of the merger negotiations, Old NCF sought assurances from the FHLBB and FSLIC in the form of favorable accounting treatment. In particular, Old NCF wanted the ability to count so-called supervisory goodwill, the difference between CFS' purchase price and its fair market value, towards its regulatory capital requirements. Old NCF viewed the accounting treatment of supervisory goodwill as a critical factor in the merger's overall success. After approving the accounting treatment for the merger, the FHLBB proceeded with the transaction and allowed Old NCF to record supervisory goodwill as a capital asset on the books of the surviving corporation. The FHLBB, as was usual in *Winstar* cases, also allowed the emerging entity to amortize such goodwill over 40 years.

As a part of the merger, Old NCF purchased all of CFS' outstanding common stock at a cost of $905,000. Old NCF then merged into CFS, but CFS remained the surviving corporation. Old NCF shareholders then engaged in a one-for-one exchange for shares of CFS. CFS adopted Old NCF's charter and bylaws, and changed its name to North Carolina Federal Savings and Loan Association ("New NCF"). The shareholders then met and voted in favor of the merger, thereby ratifying New NCF as the emerging entity.

"Infusion of Capital" and Reorganization

In 1985, the FHLBB adopted new regulations raising the capital requirements of FSLIC-insured institutions. As a result, New NCF suffered a corresponding net worth shortfall and fell into danger of liquidation. About 72 stockholders, including O. Bruton Smith and Bill Smith, purchased $3 million of New NCF preferred stock. Pls.' Sec. Am. Compl. at ¶ 40. This transaction, coupled with the accounting treatment of supervisory goodwill, allowed New NCF to remain solvent and meet its regulatory capital requirements. O. Bruton Smith and Bill Smith contributed $2.5 million and $120,000 respectively. *Id.*

In 1988, New NCF reorganized whereby NCF Financial Corporation ("NCF") acquired all of New NCF's outstanding stock and issued NCF stock on a one for one basis to New NCF's shareholders. This reorganization converted the Smiths' investment from shares in New NCF to shares in NCF. The NCF formation relied on the same accounting treatment of supervisory goodwill that accompanied the original 1982 merger of CFS and Old NCF. *Id.* at ¶ 42.

In 1989, after Congress enacted FIRREA, NCF could no longer satisfy its statutory requirements and the OTS seized control of NCF on March 1, 1990. Compl. in Intervention of Pl. FDIC at ¶ 9. The RTC thereafter became NCF's receiver, and the FDIC succeeded to RTC's responsibilities upon the RTC's statutory expiration pursuant to 12 U.S.C. § 1441a(m)(1).[5] In March 1990, the

[5] "The Corporation shall terminate not later than December 31, 1995. If at the time of its termination, the Corporation is acting as a conservator or receiver,

government placed NCF into receivership pursuant to 12 U.S.C. § 1821(c)(6). NCF's stock, of course, subsequently suffered a precipitous loss in value. The FDIC as receiver thereafter sought NCF's dissolution in an effort to satisfy NCF's creditors.

The Current Action

On August 7, 1992, the Smith plaintiffs filed suit against the United States (and later amended their complaint on April 14, 1997) alleging the government breached its contract with NCF and the Smiths by enacting FIRREA and implementing its subsequent regulations. Specifically, the Smiths make two breach of contract claims and three derivative claims. In the first contract claim, the Smith plaintiffs argue the government dangled the prospect of supervisory goodwill in front of the Smiths and the other Old NCF shareholders to induce their approval of the 1982 CFS-NCF merger. The Smiths allege they relied on this promise to their detriment when they voted in favor of the Old NCF-CFS merger. The Smith plaintiffs seek damages totaling $28 million as the value of the benefits Old NCF conferred on the United States in the Old NCF-CFS merger. Pls.' Sec. Am. Compl. at ¶ 63.

Next, in the second contract claim, the Smith plaintiffs maintain that the government altered its regulations[6] in 1985 for the specific purpose defraying government costs for the potential liquidation of New NCF by inducing its shareholders to contribute $3 million to meet the increased regulatory capital requirements. *Id.* at ¶¶ 39-41. The Smiths claim they, as well as 72 other shareholders, relied on the government's promise to credit supervisory goodwill against capital requirements when the shareholders contributed the $3 million to New NCF. After this investment, however, the Smiths allege the United States' adoption of FIRREA "fundamentally changed the nature of the investment of [the Smiths] and the other stockholders, rendering their stock worthless through circumstances beyond their control." *Id.* at ¶ 57. The Smith plaintiffs seek the

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the Federal Deposit Insurance Corporation shall succeed the Corporation as conservator or receiver."

[6] Pls.' Sec. Am. Compl. at ¶¶ 39, 71.

$3 million as the value of the benefits conferred on the United States in the 1985 capital infusion. *Id.* at ¶ 71.

The Smith plaintiffs' first derivative claim addresses the 1985 $3 million capital infusion to New NCF. Plaintiffs O. Bruton Smith and Bill Smith originally owned Old NCF shares which converted to New NCF shares after the 1982 merger with CFS. In 1985, they purchased an additional $2.62 million of New NCF stock as a part of an overall $3 million capital infusion. *Id.* at ¶ 40.[7] The Smiths assert a derivative claim as shareholders of NCF because NCF's 1988 reorganization transformed all outstanding New NCF shares to NCF shares. As shareholders of NCF, therefore, the Smiths allege the defendant harmed NCF by enacting FIRREA and preventing NCF from using supervisory goodwill as a capital asset, thereby requiring the capital infusion to meet regulatory capital requirements. The Smiths seek $3 million in restitution for the amounts the shareholders contributed to New NCF.

The Smith plaintiffs' second derivative claim arises from the original 1982 Old NCF-CFS merger. As shareholders of NCF, the Smiths believe they are "entitled to have and recover the lost value of the common stock of N.C. Federal held by NCF, for NCF, and for themselves and the other NCF shareholders similarly situated. . . ." Pls.' Sec. Am. Compl. at ¶ 97. The Smiths seek $28 million to recover the value of the equity Old NCF shareholders contributed to the 1982 merger.

The Smith plaintiffs' final derivative claim also springs from the original 1982 merger between Old NCF and CFS. The Smiths allege the defendant's breach caused NCF to lose the original Old NCF shareholder equity that was part of the 1982 Old NCF-CFS merger. They seek $28 million, which includes the benefits Old NCF conferred on the United States in the 1982 merger, as well as the $3 million capital infusion in 1985.

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[7] O. Bruton Smith purchased $2.5 million of additional New NCF stock, and Bill Smith purchased an additional $120,000 of New NCF stock. Pls.' Sec. Am. Compl. at ¶ 40.

The Smith plaintiffs also advance a Fifth Amendment takings claim as an alternative to their breach of contract claim. The Smiths' takings claim bears two prongs: first, the government's breach constituted a taking of the value of the Smith plaintiffs' shares, as well as their vested contract rights upon FIRREA's passage. Second, the governments' breach constituted a taking because the Smiths possessed a valid property right in the contract between Old NCF and CFS by virtue of promissory estoppel. The Smith plaintiffs allege the government knew its promises relative to supervisory goodwill would induce reasonable reliance on behalf of the Smiths and the other shareholders at Old NCF. The Smiths seek $28 million in damages as the value of the contract rights taken by the United States.

The FDIC intervened as a plaintiff in its role as the successor-in-interest to NCF's rights and obligations. The FDIC, on behalf of NCF, offers essentially the same breach of contract arguments as the Smiths. Specifically, the FDIC contends FIRREA's restriction on NCF's inclusion of supervisory goodwill as a capital asset "constitute a repudiation and abrogation of [NCF's] contract rights. . . and effect a taking of its property without just compensation, in violation of the Fifth Amendment to the Constitution." Comal. in Intervention of FDIC at ¶¶ 28, 30, and 32. The FDIC asks the court to compensate the FDIC for the value of its costs expended, as well as the benefits conferred on the defendant, through its management and operation of NCF as NCF's receiver. *Id.* at ¶ 10, ¶ (b).

Discussion

The sole issue before this court is one of jurisdiction: the respective standing of plaintiff shareholders and the FDIC in this *Winstar*-type action. At its heart, the doctrine of standing is a jurisdictional requirement stemming from the case-or-controversy requirement of Article III, Section 1 of the Constitution. *E.g.*, *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992)("Though some of its elements express merely prudential considerations that are part of judicial self-government, the core component of standing is an essential and unchanging part of the case-or-controversy requirement

of Article III").[8] It is beyond dispute that this requirement applies to an Article I court, such as the Court of Federal Claims, when the court is exercising the judicial power of the United States. *See Anderson v. United States*, ___ F.3d ___, 2003 WL 22213357 (Fed. Cir. 2003);[9] *H.C. Bailey, Jr. v. The United States*, 341 F.3d 1342 (Fed. Cir. 2003). *See also Freytag. v. Commissioner of Internal Revenue*, 501 U.S. 868, 888-891 (1991)(Article I tax court construed to be "Court of Law" under Constitution).

The Smiths' Standing

The Smiths argue that as investors in Old NCF, which is now the defunct NCF, they (1) possess a direct claim against the United States for breach of contract; (2) suffered derivative harm as shareholders of NCF; and (3) claim the defendant's breach resulted in a compensatory taking under the Fifth Amendment to the United States Constitution. Pl. Resp. to OSC, pp. 1-4. The court addresses each of these arguments *seriatim*.

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[8] The *Lujan* Court defined standing as having three components:

> First, the plaintiff must have suffered an injury in fact – an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of – the injury has to be [fairly traceable to the challenged action of the defendant]. Third, it must be likely, as opposed to merely speculative, that the injury will be [redressed by a favorable decision].

Lujan, 504 U.S. at 561-62 (citations and internal quotations omitted).

[9] "The Court of Federal Claims, though an Article I court, 28 U.S.C. §171 (2000), applies the same standing requirements enforced by the other federal courts created under Article III," *Anderson*, 2003 WL 22213357 at 10, n.1 (citing *Glass v. United States*, 258 F.3d 1349, 1355-56 (Fed. Cir. 2001); *CW Gov't Travel, Inc. v. United States*, 46 Fed. Cl. 554, 557-58 (2000), and 28 U.S.C. §2519 (2000) (empowering the Court of Federal Claims to enter final judgments in any "claim, suit, or demand against the United States arising out of the matters involved in the case or controversy.")).

Direct Breach of Contract Claim

The Smith plaintiffs' primary contention is that as shareholders of Old NCF, they were swayed by the government's promise of counting supervisory goodwill as a capital asset and as a result voted for the 1982 Old NCF-CFS merger. Specifically, they argue the FHLBB intended to contract with Old NCF because the FHLBB viewed Old NCF as a viable institution that could "stave of the eminent [sic] failure of Carolina Federal. . . ." Pls.' Opp. To Def's. Motion for Lv. to File Notice of Supp. Auth. In Supp. Of Consol. Brf. on Standing at 6. The FHLBB, the Smiths allege, knew that such a merger would never occur unless it was financially beneficial to Old NCF and its stockholders. While the FHLBB, the Smiths contend, could compel CFS to merge because of its precarious financial position, it could not require the same of Old NCF or its stockholders.

Old NCF's stockholders, the Smith plaintiffs maintain, held "the ultimate power" to approve the merger with CFS. *Id.* at 3. As stockholders, the Smiths thus claim they conditioned their approval of the merger on a "certain amount" of supervisory goodwill amortized over 40 years. *Id.* at 4. The Smiths claim they relied on this provision in Old NCF's negotiations with the FHLBB, and never would have approved the merger absent a negotiated provision for supervisory goodwill. *Id.* The Smiths contend the shares acquired after the merger would be worthless without the supervisory goodwill. "Absent contract, the goodwill would not be a depreciable capital asset but merely a shadowy, unstable figment of the imagination, an unsubstantial nothing, which would leave [the Smiths'] merged corporation insolvent and failing. . . . Only an utter fool would have ruined his thrift by merging without the contract." *Id.*

Defendant in response contends the Smith plaintiffs lack privity of contract with the government because the Smiths played no role in the merger negotiations between Old NCF and CFS. Defendant stresses the Smiths admitted they had no involvement "directly or indirectly, in any aspect of the negotiations or N.C.

Federal's decision to enter into the definitive agreements." Def's. Consol. Brf. in Supp. of Mot. to Dis. Pl. for Lack of Standing at 4.

The Smiths' only connection to the NCF-CFS negotiations, the defendant further alleges, arises through the legal requirement of obtaining shareholder approval for mergers.[10] Furthermore, this mandatory legal requirement, according to defendant, belies the Smiths' contention that there was a voluntary contractual relationship between the Smiths as shareholders and the government because the merger never would have occurred but for the shareholders' approval. Critical to the issue of privity of contract, defendant points to the Smiths' lack of participation in the regulatory approval of the Old NCF-CFS merger. Indeed, the Smiths are neither mentioned in the relevant documents Old NCF submitted to the FHLBB as a part of the merger, nor are they signatories to these documents. *Id.* at 5. In fact, the only mention of the Smiths, according to defendant, results from the proxy statement Old NCF issued to them prior to the merger. *Id.* at 7. "Nothing in the proxy statement remotely suggests that regulators intended to enter into a contract with either shareholders or the thrift – much less these particular shareholders." *Id.*

The court essentially agrees with defendant.[11] It must be stressed that the Smiths, as the parties invoking jurisdiction, bear the burden of establishing standing. *See Warth v. Seldin*, 422 U.S. 490, 508, 95 S. Ct. 2197, 2210 (1975). *See also Sterling Sav.*, 57 Fed. Cl. 234, 236 (2003). The focus of a standing inquiry rests on the status of a party bringing a complaint rather than the merits of his claim. *Id.* "To have standing in this court on a contract claim, plaintiff must be in privity of contract with the government." *Franklin Fed. Sat. Bank*, 53 Fed. Cl. 690, 716-17 (2002)(quoting *Paced v. United States*, 50 Fed. Cl. 239, 243 (2001)).

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[10] 12 C.F.R. § 552.13(h) (2003); N.C. GEN. STAT. § 54B-35(3)-(4) (2003) (merging savings and loan associations must obtain stockholder approval to merge).

[11] The court notes that the FDIC takes no position as to the Smith plaintiffs' direct contract claims.

Consequently, the Smiths' claim for standing to sue on their direct breach of contact action ultimately rests on their involvement in, as well as their relation to the parties involved in the Old NCF-CFS merger. In other words, the Smiths must demonstrate how they, as individual shareholders of Old NCF, stood in privity of contract with the United States.

Privity is the "connection or relationship between two parties, each having a legally recognized interest in the same subject matter (such as a transaction, proceeding, or piece of property). . ." BLACK'S LAW DICTIONARY 1272 (Bryan A. Garner ed., West Group 7th ed. 1999) (1933). To establish privity of contract with the government, the Smith plaintiffs must therefore demonstrate that "they are owed duties by the Government separate and apart from the duties owed to the corporation." *Franklin Fed.*, 53 Fed. Cl. at 717. Ergo, the Smith plaintiffs will only be able to establish standing and maintain their claim against the government if they demonstrate the government breached an express or implied duty owed to the Smiths personally and independently of their status as shareholders of NCF.

The Smith plaintiffs clearly lack privity with the government. There is simply no contractual relationship between the Smiths and the government deriving from the regulatory forbearance agreement to provide for the use of supervisory goodwill. Nor is there any demonstrable agreement between the Smiths and the government. The fact that the regulators knew a vote from shareholders was necessary to approve a merger or that shareholders expected favorable regulatory treatment for the surviving thrift does not make the Smiths parties to the contract. *See FDIC v. United States*, 342 F.3d 1313, 1319 (Fed. Cir. 2003)(knowledge that shareholders will supply new capital to rehabilitate thrift does not make shareholders party to contract). The uncontested facts in the record do not indicate the government regulators either intended to negotiate

directly with the Smiths, or actually did negotiate directly with the Smiths.[12]

The government, furthermore, did not execute any direct agreement with the Smiths. No implied-in-fact agreement existed because there simply is no evidence of a mutual intent to contract. Nor have the Smiths demonstrated any kind of "meeting of the minds" with the government. *See Trauma Serv Group v. United States*, 104 F.3d 1321, 1325 (Fed. Cir. 1997) (requirements for both an express or implied contract under Tucker Act are the same: (1) mutuality of intent to contract, (2) consideration, (3) lack of ambiguity in offer and acceptance, and (4) actual authority of the government representative whose conduct is relied upon to bind the government in contract). *See also Lewis v. United States*, 70 F.3d 597, 600 (Fed. Cir. 1995); *City of El Centro v. United States*, 922 F.2d 816, 820 (Fed. Cir. 1990).

Simply put, the FHLBB merely facilitated the merger between Old NCF and CFS. Any benefits or detriments flowing to the Smiths occurred not because they were parties to that merger or parties to a regulatory agreement, but simply because they were shareholders of the corporate entity involved and suffered losses or derived benefits no different than any other shareholder. Indeed, this breach of contract claim may only be brought by the FDIC in its capacity of successor-in-interest to NCF because the Smiths in their capacity as shareholders were not party to the forbearance agreement. *See Glass v. United States*, 258 F.3d 1349, 1355 (Fed. Cir. 2001) ("[B]ecause the shareholders did not stand to directly benefit under the contract, they are at most incidental beneficiaries of the contract with no rights to enforce the contract against the United States."). It is now well-established in this Circuit that only parties

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[12] The facts establish that CFS agents, at the urging of FHLBB, contacted Old NCF, not O. Bruton Smith and Bill Smith individually, about the possibility of a supervisory merger with CFS. The Smiths never saw any of the documents relating to the merger, nor did they participate in any of the Old NCF-CFS negotiations. The Smiths never executed any document in connection with the merger or with the process of obtaining regulatory approval. In fact, O. Bruton Smith admitted during discovery he personally knew of no promise or contract with any regulator associated with the Old NCF-CFS merger. App. Mot. Dismiss Counts Three Through Seven Of Smith Pls.' Second Am. Compl., Cross-mot. For Summ. J. And Opp'n PLS.' Mot. For Partial Summ. J. Vols I-IV (Dec. 1999) at 1370-1405, 1407-1422.

to an agreement, and in the context of third parties such as shareholders that usually means signatories,[13] may sue for direct breach of contract. *E.g.*, *Anderson*, 2003 WL 22213357 at *7; *FDIC v. United States*, 342 F.3d at 1319; *Castle v. United States*, 301 F.3d 1328, 1339 (2002).

The Smith plaintiffs' second contract claim – that the government altered its regulations in 1985 for the specific purpose defraying government costs for the potential liquidation of New NCF by duping its shareholders to contribute $3 million by the broken promise of supervisory goodwill – likewise fails for the same reason as the first – a complete absence of any showing of privity of contract between the Smiths and the government. There simply is no evidence in the record of direct or indirect negotiations between the government and the Smiths relating to the $3 million capital infusion. Indeed, there is simply no written or oral evidence as to the existence of an agreement between the government and the Smiths relating to the supervisory goodwill and the forbearance of any capital requirement. Consequently, the Smith plaintiffs fail to meet their burden of establishing standing in their direct contract claims.

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[13] An exception to this rule is where a party can be considered a third-party beneficiary to the contract. The Federal Circuit, nevertheless, recognizes third-party beneficiary status only as an "exceptional privilege" if the party can "show that [the contract] was intended for his *direct* benefit." *Glass v. United States*, 258 F.3d 1349, 1354 (Fed. Cir. 2001) (citations omitted). The court explained that "specifically, in order to make a shareholder a third party beneficiary, the contract must express the intent of the promissor to benefit the shareholder *personally, independently of his or her status as a shareholder.*" *Id.* at 1353-54 (emphasis added). *See Castle v. United States*, 301 F.3d 1328, 1338 (2002); *see also Bailey*, 341 F.3d 1342, 2003 WL 22015442, slip op. at *6 (dismissing shareholder's suit for lack of standing). It is clear that under this test the Smith plaintiffs cannot and do not show that the federal regulators in the forbearance agreement intended to specifically benefit the Smiths. To the contrary, however, they argue their claim does *not* depend on their status as third-party beneficiaries. Smith PLS.' Resp. to OSC at 7. As such, any third party beneficiary claim has been effectively waived. *See Becton Dickinson & Co. v. C.R. Bard, Inc.*, 922 F.2d 792, 800 (Fed. Cir. 1990) (holding that failure to raise issue in brief constitutes waiver of appeal of the issue); *see also Cubic Defense Systems v. United States*, 45 Fed. Cl. 450, 466-468 (1999) (noting that to permit raising an argument not briefed would contravene notice pleading requirements of modern federal rules of appellate and civil procedure and would condone "litigation by ambush"). Accordingly, without either direct privity or third-party beneficiary status, the Smith shareholders lack standing to sue the government under a breach of contract theory.

Shareholder Derivative Claims

The Smiths advance shareholder derivative claims as alternate grounds for standing. They make three derivative claims: (1) on behalf of NCF for its loss of a $3 million "capital infusion" in 1985; (2) on behalf of NCF for the lost value of NCF common stock in the wake of NCF's collapse; and (3) a "general derivative claim" on behalf of all Old NCF and NCF shareholders for $28 million in lost shareholder equity related to the 1982 Old NCF-CFS merger. Pls.' Sec. Am. Compl. at ¶¶ 83-106.

1985 Capital Infusion

The Smiths' first argument for derivative standing arises through their purchase of $3 million of preferred stock in New NCF in 1985. Pls.' Sec. Am. Compl. ¶¶ 40, 84. The Smiths were 2 of 72 New NCF shareholders who purchased additional stock in response to the government's regulatory changes that left New NCF with a capital shortfall. *Id.* at ¶ 39. The $3 million of additional New NCF stock, claim the Smiths, allowed New NCF to meet its capital requirements thereby preventing New NCF from falling into receivership. Although this transaction involved New NCF, the Smiths claim derivative status through NCF because of its 1988 reorganization. As a part of that reorganization, the Smiths received one share of NCF stock in exchange for each of their shares of New NCF stock. Since the reorganization, the Smiths maintained their status as shareholders in NCF. Their derivative claim results from the government's breach of contract in the wake of FIRREA. The Smiths claim the government's breach caused NCF to lose the $3 million "capital infusion" without any prospect for recovery or reimbursement. *Id.* The Smiths allege that they, and other similarly situated shareholders, are entitled to restitution of the $3 million they contributed to New NCF in exchange for the preferred stock. *Id.* at ¶ 90.

The defendant contends the Smiths lack standing because they have no hope of recovery under the statutory priority system that gives priority to the government's claims against the

receivership.[14] *See* 12 U.S.C. § 1821(d)(11)(A) (2001)(shareholders have statutory property interest in surplus remaining after liquidation of failed thrift only after creditors claims are satisfied).[15] The defendant argues the Smiths would have derivative standing only if they could maximize a recovery large enough to survive the priority system. "[S]hareholder plaintiffs advancing derivative claims can do no more than attempt to ensure the largest damages award possible, in the hopes of creating a surplus recovery that will result in distribution to them." Def. Consol. Brf. in Support of Motion to Dismiss for Lack of Standing at 14. The defendant asserts the plaintiffs do not have any hope of recovery because any award they receive of behalf of NCF will necessarily flow to the government under the priority system. As a result, the defendant claims the Smiths do not possess a colorable case or controversy against the United States and must be dismissed for lack of standing. *Id.* at 15; Def's. Consol. Reply in Support of Motion to Dismiss for Lack of Standing at 23-24.

This court agrees with defendant. In *California Hous. Sec., Inc. v. United States*, 959 F.2d 955 (Fed. Cir. 1992), the Federal Circuit identified a factual scenario whereby a shareholder possessed derivative standing in a liquidation context. *California Housing* involved a sole shareholder of a failed thrift that sued the

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[14] The FDIC, however, unlike defendant, takes no position as to the validity of the $3 million 1985 claim. FDIC's Response to OSC at 2.

[15] 12 U.S.C. § 1821(d)(11)(A) (2001) provides:

> Subject to section 1815(e)(2)(C) of this title, amounts realized from the liquidation or other resolution of any insured depository institution by any receiver appointed for such institution shall be distributed to pay claims (other than secured claims to the extent of any such security) in the following order of priority:
>
> (i) Administrative expenses of the receiver.
>
> (ii) Any deposit liability of the institution.
>
> (iii) Any other general or senior liability of the institution (which is not a liability described in clause (iv) or (v)).
>
> (iv) Any obligation subordinated to depositors or general creditors (which is not an obligation described in clause (v)).
>
> (v) Any obligation to shareholders or members arising as a result of their status as shareholders or members (including any depository institution holding company or any shareholder or creditor of such company).

government on a Fifth Amendment takings claim. *Id.* at 956. The government argued the shareholder lacked both individual and derivative standing. The Federal Circuit, however, rejected this argument and found that a shareholder would have derivative standing if its complaint "could be construed as filed by a sole shareholder on behalf of a corporation alleging that compensation to the corporation will result in a surplus in which the shareholder possesses a direct interest pursuant to 12 U.S.C. § 1821(d)(11)(B)." *Id.* at 957 n.2.

The Circuit, following *California Housing*, applied the same analysis in the bankruptcy context in *Branch v. United States*, 69 F.3d 1571 (Fed. Cir. 1995). In *Branch*, a bankruptcy trustee acting on behalf of the sole owner of a failed bank sued the United States on a takings claim. *Id.* at 1574. In asserting the failed bank's claims, the trustee described the suit as a shareholder derivative action "on behalf of and in the name of the bank." *Id.* Based on these facts, the Federal Circuit found that a judgment in the trustee's favor would not only increase the bank's assets, but could also provide a surplus that would benefit the bank's shareholders. *Id.* at 1575. Following *California Housing*, the court found the Court of Federal Claims could entertain the trustee's action because "the complaint could be construed 'as filed by a sole shareholder on behalf of a corporation alleging that compensation to the corporation will result in a surplus in which the shareholder possesses a direct interest.'" *Id.* (quoting *California Housing*, 959 F.2d at 957 n.2).

While the Federal Circuit has not definitively stated when shareholders possess derivative standing in an actual *Winstar*-related case, various decisions of this court have applied the *California Housing-Branch* analysis.[16] The common thread running through these cases is that shareholders may assert derivative status only when there is a reasonable likelihood of a surplus recovery in light of

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[16] *See FDIC v. United States*, 51 Fed. Cl 265, 272-273 (2001); *Anderson v. United States*, 47 Fed. Cl. 438, 442, n.3 (2000); *Plaintiffs in all Winstar-Related Cases v. United States*, 44 Fed. Cl. 3, 10-12 (1999).

the priority scheme outlined in 12 U.S.C. § 1821(d)(11)(A) (2001). This court agrees.

As stated, the Smiths filed a derivative claim on behalf of NCF to recover the $3 million capital infusion that certain shareholders contributed to New NCF in 1985. Assuming the Smiths prevailed, however, this court finds the Smiths have no plausible, reasonable, or even hopeful chance for a surplus recovery. As of December 31, 2001, NCF owes a staggering $136,396,351 to the United States. Def's Consol. Brief In Supp. of Motion to Dismiss PLS. for Lack of Standing at 14. Thereafter, the FDIC as receiver would take possession of the $3 million monetary award and distribute it to the United States as creditor in accordance with 12 U.S.C. § 1821(d)(11)(A) (2001). The Smiths as derivative plaintiffs, therefore, do not truly stand adverse to the defendant because they have no hope for a surplus recovery. As a result, this court finds the Smiths lack derivative standing for their 1985 capital infusion. There simply is no case or controversy here.

NCF's Common Stock and Lost Old NCF Shareholder Equity

The Smith plaintiffs' second claim for derivative standing stems from NCF's dramatic loss of value after FIRREA's enactment. NCF's inability to meet its regulatory capital requirements after FIRREA was enacted, the Smiths contend, detrimentally affected NCF's ability to conduct business and caused a massive drop in shareholder value. They trace the loss in value of NCF stock to the government's alleged breach of the forbearance provisions of the 1982 merger between Old NCF and CFS. Pls.' Resp. to OSC at 1. In all, the Smiths allege the government's breach caused NCF a net $28 million loss. Pls.' Sec. Am. Compl., Count Six, ¶ 97.

The Smith plaintiffs' third and final claim for derivative standing stems from their status as shareholders of NCF. Under the heading "General Derivative Claims," the Smiths allege as shareholders of NCF, they "adequately represent the interests of the shareholders similarly situated in enforcing the rights of NCF, New NCF, and Old NCF." Pls.' Sec Am. Compl., Count Seven, ¶ 102. The thrust of this derivative claim proceeds along two different

fronts: first, the RTC's alleged failure to assert derivative claims against the United States while the RTC acted as receiver for NCF, and second, the RTC itself "was at fault or partially at fault for causing losses [alleged by the Smiths]. . ." Pls.' Sec Am. Compl. ¶ 103. The Smiths ask for restitution of the $28 million in shareholder equity conferred on the United States by virtue of the 1982 Old NCF-CFS merger. Pls.' Sec. Am. Compl. ¶ 106.

The defendant attacks the Smiths' arguments by claiming the Smiths effectively conceded their inability to advance any derivative claim by failing to respond to the defendant's statutory priority argument (discussed immediately above). Def. Consol. Reply In Supp. of Motion to Dismiss Pls. for Lack of Standing at 23. The defendant further faults the final derivative claim in that the Smiths assert it in their capacity as Old NCF shareholders rather than on behalf of NCF, the merged entity. *Id.* at n.23. The defendant points out that generally, a merger between entities results in the destruction of one company and the emergence of a new company and, therefore, the derivative claim is really asserted on behalf of a defunct entity, Old NCF. *Id.*

The FDIC also attacks the Smiths' derivative claims on standing grounds, but first asks the court to determine if the Smiths possess any direct contract claims against the government. FDIC's Resp. to OSC at 2. The FDIC argues that if the court finds that the Smiths *do not* have any direct claims, but their claims are instead found to be *entirely* derivative, all the claims must be dismissed because the Federal Circuit's *Landmark* line of cases hold that the FDIC as receiver is the successor-in-interest to NCF but lacks standing on case-or-controversy grounds.[17] *Id.* If this court, however, determines the Smiths *do* have standing to assert direct claims, the FDIC argues, this court needs to determine which, if any, of the Smiths' claims are also derivative. *Id.* Any found derivative claim means to the FDIC that they must be joined as an

[17] The court discusses the FDIC's standing in Section II.D., *infra*.

indispensable party and presumably only these claims would be dismissed on *Landmark* grounds. *Id.* at 2-3.

Nevertheless, the FDIC argues that the Smiths' so-called second derivative claim is not a derivative claim at all and was asserted merely as a mechanism to restate their prior claim for personal losses. FDIC's Resp. to OSC at 5. "[The Smiths] are suing for harm sustained directly by the [NCF], with only secondary effects on [the Smiths] themselves, and other stockholders." *Id.*

Furthermore, as to the third and final derivative claim, the FDIC asserts that it can only be brought by FDIC as NCF's successor in interest. *Id.* at 2, 5. Thus, the FDIC claims it is the only party that would have standing to prosecute this claim: "[F]DIC as successor in interest to NC Federal, not [the Smiths], owns any claim for the value of the contributed thrift." *Id.* at 6.

The court agrees with the defendant and the FDIC. The Smith plaintiffs' second so-called derivative claim is not at all about the loss of value of NCF shares as they contend, but really about recoupment of their personal $28 million contribution to the Old NCF/CFS merger. Clearly, it is not a derivative claim at all because the $28 million in shareholder equity represents contributions from individual shareholders. Any claim for loss of investment value belongs solely to these shareholders as individuals not to all shareholders of the corporation or to the corporation as a *de jure* entity. *See Daily Income Fund v. Fox*, 464 U.S. 523, 528-29 (1984) ("[T]he term 'derivative action,' . . . has long been understood to apply only to those actions in which the right claimed by the shareholder is the one the corporation could itself have enforced in court."). *See also First Hartford Corp. v. United States*, 194 F.3d 1279, 1294 (Fed. Cir. 1999)(The derivative shareholder suit device "permits shareholders to step into the shoes of the corporation and file suit as fiduciaries on the corporation's behalf and for the corporation's benefit.")

Furthermore, defendant's alternative argument is also correct. The Smith plaintiffs' "derivative" claim here for restitution of the $28 million is infirm because it is in reality a claim made on behalf

of a defunct corporation – Old NCF. It does not rest directly on the decline of the fair market value of NCF stock due to the government's breach in enacting FIRREA in 1989, but, instead, is predicated upon a tenuous chain of events stemming from the Smiths' initial investment as shareholders to Old NCF and the government's alleged breach of the original 1982 merger between Old NCF and CFS. Pls.' Sec. Am. Compl. at ¶¶ 59-60, 96-97. The Smiths advance a tenuous "but for" argument:

- but for their $28 million, Old NCF would never have merged with CFS,
- which, in turn, would never have needed supervisory goodwill,
- which then would never have become New NCF,
- which thereafter would never have reorganized to NCF,
- which ultimately would never have suffered from the government's breach via FIRREA.

The problem with this syllogism is that the links in the Smiths' argument break because the chain itself has been corroded by speculation,[18] and because damages for the loss of the value of the contribution, if this really is a derivative claim (which it is not), ultimately would belong to Old NCF, an entity which merged into

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[18] Generally, damages may not be recovered if too speculative because by definition such damages are not foreseeable by the parties to an agreement. *See* RESTATEMENT (SECOND) OF CONTRACTS § 351:

> (1) Damages are not recoverable for loss that the party in breach did not have reason to foresee as a probable result of the breach when the contract was made.
>
> (2) Loss may be foreseeable as a probable result of a breach because it follows from the breach
>
> (a) in the ordinary course of events, or
>
> (b) as a result of special circumstances, beyond the ordinary course of events, that the party in breach had reason to know.

RESTATEMENT (SECOND) OF CONTRACTS § 351(1981); *see also Landmark Land Co. v. United States*, 265 F.3d 1365, 1378 (Fed. Cir. 2001); *Anchor Sat. Bank, FSB v. United States*, No. 95-39 C (Fed. Cl. September 29, 2003) at ___; *Westfed Holdings, Inc. v. United States*, 55 Fed. Cl. 544, 552 (2003).

CFS (which in turn merged into New NCF) and is thus dead as a door knob. It stands to reason that if the corporate entity is deceased any claims asserted on its behalf are likewise moribund. Generally, "[a] merger of two corporations contemplates that one corporation will be absorbed by the other and will cease to exist while the absorbing corporation remains." *Engel v. Teleprompter Corp.*, 703 F.2d 127, 131 (5th Cir. 1983)(citing *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 331 n.7 (1963)).[19] In other words, the Smiths cannot assert a derivative claim on behalf of a company that ceased to exist after a merger.

Finally, the Smith plaintiffs' third category of derivative claims, their self-styled "General Derivative Claims," is likewise deficient. Any claim asserted on behalf of NCF belongs to the FDIC as its receiver. "It is beyond dispute that a cause of action arising from an injury to a corporation belongs solely to the corporation, and that shareholders seeking to pursue those damages may only do so on behalf of the corporation, and only if the corporation has failed to do so itself." *Hometown Fin. Inc. v. United States*, 56 Fed. Cl. 477 486 (2003). As a result, courts consistently hold that "shareholders lack standing to bring cases on their own behalf where their losses from the alleged injury to the corporation amount to nothing more than a diminution in stock value or a loss of dividends." *Id. See also Robo Wash, Inc. v. United States*, 223 Ct. Cl. 693, 696-97 (1980). The derivative suit, however, permits shareholders to file suit on behalf of the corporation *only* when no other legal entity for the corporation chooses to do so, or the corporation's legal interests are not adequately represented. *See First Hartford Corp. Pension v. United States*, 194 F.3d 1279, 1295 (Fed. Cir. 1999); *AG Route Seven P'ship v. United States*, 57 Fed. Cl. 521, 534 (2003).

Simply put, the FDIC as receiver is the successor-in-interest to NCF. *See Castle*, 301 F.3d at 1338-39; *Glass*, 258 F.3d at 1355. It represents NCF in all legal proceedings brought against it, and is

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[19] Moreover, according to the North Carolina Business Corporation Act, "[w]hen a merger takes effect: [e]very other corporation party to the merger merges into the surviving corporation and the separate existence of every corporation except the surviving corporation *ceases*."

N.C. GEN. STAT. § 55-11-06(a)(1) (emphasis added).

charged with administering its debt reduction.[20] The court agrees with the FDIC that the Smith plaintiffs do not allege any claims available to NCF that would not be adequately represented by the FDIC. *See AG Route Seven P'ship v. United States*, 57 Fed. Cl. at 534. As a result, the Smith plaintiffs do not have standing as derivative shareholders under their general derivative claims theory.

Fifth Amendment Takings Claim

Lastly, the Smith plaintiffs claim standing under a taking theory. The Smiths assert two theories. The first is based on a taking of the value of their shares, or at least a significant diminution of value of these shares, and a taking of their vested contract rights with passage of FIRREA. In the negotiations, the Smiths claim they, as shareholders of NCF with the ultimate power to approve the merger, relied to their detriment on the government's promises of beneficial treatment of supervisory goodwill. In reliance on this promise, the government "conferred property rights upon [the Smiths] and other shareholders in Old N.C. Federal within the meaning of the Fifth Amendment to the United States Constitution." Pls.' Sec. Am. Compl., at 31, ¶ 80. The Smiths further claim the government intended FIRREA "to effect a taking and . . . designed to accomplish that end." *Id.* at 32, ¶ 81. This legislation, moreover, "has taken and condemned the vested contract rights and property of the Plaintiffs . . . including the entire value of the stock and attendant corporate rights bargained and sold by contract with the United States. . . ." *Id.*

The Smith plaintiffs' second takings argument is based on the doctrine of promissory estoppel. According to the Smiths, the government knew its promises relative to supervisory goodwill would induce reasonable reliance on behalf of the Smiths and the other shareholders at Old NCF. If the court finds no contract

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[20] The FDIC, as receiver, succeeds to all rights, titles, powers, and privileges of the insured depository institution. 12 U.S.C. § 1821(d)(2)(A) (2001). In this capacity, the FDIC conducts the business of the institution with all of the powers of the shareholders, directors and officers. 12 U.S.C. § 1821(d)(2)(B) (2001). The FDIC may also liquidate the institution "having due regard to the conditions of credit in the locality." § 1821(d)(2)(E) (2001).

existed, asserts the Smith plaintiffs, it should imply one as a matter of law via promissory estoppel so the Smiths will not be left without a remedy. Pls.' Resp. to OSC at 7-8; Pls.' Reply to FDIC's OSC Resp at 3.

The court rejects both of the Smiths' takings arguments because the Smiths, as shareholders, simply have no standing to bring a takings claim under the facts of this case. The law of this Circuit is clear: what was taken by the government here was not the thrift or the shares, but the contractual right to use supervisory goodwill as an asset and for amortization of the asset. *See Bailey v. United States*, 341 F.3d 1342, 1347 (Fed. Cir. 2003); *First Hartford Corp.*, 194 F.3d at 1286. Much like the plaintiffs in *Bailey*, *Glass*, and *Castle*, the Smiths were not parties to the regulatory agreement, "therefore this theory of an alleged taking of the contract is contingent and must be asserted by the FDIC." *Bailey*, 341 F.3d at 1347. *See Glass*, 258 F.3d at 1355; *Castle v. United States*, 301 F.3d 1328, 1338-39 (Fed. Cir. 2002). Furthermore, any seizure of a thrift for failure to comply with FIRREA does not constitute a regulatory taking because the Smiths, "through the FDIC, [were] not deprived of a contractual remedy for the government's breach to recover the thrift's assets." *Bailey*, 341 F.3d at 1347 (citing *Castle*, 301 F.3d at 1341, 1342); *Castle*, 301 F.3d at 1342 (enactment of FIRREA "did not deprive the plaintiffs from a contractual remedy . . . plaintiffs retained the full range of remedies associated with any contractual property right they possessed.").

While the Smith shareholders do possess a statutory property interest (12 U.S.C. § 1821(d)(11)(A) (2001)) in any liquidation surplus (after payment to creditors in the statutory priority scheme), *Bailey*, 341 F.3d at 1347; *Hartford Corp.*, 194 F.3d at 1287-88, receivership proceeds after liquidation are not available for *derivative* recovery by the Smith shareholders for the reasons stated in Section II.A.(2), *supra*. Only after a surplus in liquidation assets results from a ruling in favor of FDIC may shareholders claim a stake in the remaining proceeds. *Id.*; *First Hartford Corp.*, 194 F.3d at 1288. However, like the plaintiffs in *AG Route Seven P'ship v. United States*, 57 Fed. Cl. 521, 534 (2003), the Smith plaintiffs do

not allege that their statutory interests are compromised, and so have not met their burden to establish standing on this type of takings claim.

Finally, as alluded to above, this court, like the court in *AG Route Seven P'ship*, declines to adopt a takings claim based on promissory estoppel for the simple reason that the Smith plaintiffs do not possess privity of contract. *See AG Route Seven P'ship v. United States*, 57 Fed. Cl. at 534 n.31 (rejecting plaintiffs' "fair result" argument as lacking support in case law). This argument is at its heart merely a repetition of their first alleged takings claim clothed in new attire.

The FDIC's Standing

The FDIC intervened in this matter as the successor in interest to the failed thrift, NCF. The FDIC represents NCF as a receiver, and processes all creditor claims against the thrift in accordance with the statutory priority scheme.[21] The FDIC intervened in this case, as well as 40 other *Winstar* cases, because "shareholder plaintiffs were asserting claims belonging to failed thrifts." FDIC's Resp. to OSC at 3; *see Plaintiffs In All Winstar-Related Cases*, 41 Fed. at 12. Here, the FDIC alleges the Smiths attempted to subvert the receivership priority system by filing their own derivative claims on behalf of NCF. The FDIC argues that as NCF's successor in interest, all claims relating to NCF's collapse belong to the FDIC only.

As mentioned above, the FDIC offers an analytical framework for analyzing its standing relative to Smiths' standing.

---

[21] When NCF failed, the government appointed the Resolution Trust Corporation ("RTC") as NCF's receiver. The RTC satisfied NCF's insured outstanding deposit liabilities. After paying these liabilities, the RTC subrogated by law to the rights of NCF's depositors against the thrift. 12 U.S.C. § 1821(g); *see* 12 U.S.C. 1441a(b)(4)(A) (applying 12 U.S.C. § 1821(g) to the RTC), and 12 C.F.R. § 360.3. These claims eventually passed to the FSLIC Resolution Fund ("FRF") when the RTC ceased to exist. 12 U.S.C. § 1441a(m)(2). The FDIC administers the FRF and prepares a yearly statement that outlines the exact amount receiverships owe the FRF in subrogated claims. *See also* n.12, *supra*.

The FDIC contends this court cannot apply the *Landmark* test (*See Landmark Land Co.*, 256 F.3d 1365 (Fed. Cir. 2001)) until the court determines if the Smiths possess any direct contract claims against the government. If the Smiths do not have any direct claims, then their other claims must necessarily be derivative and neither the Smiths nor the FDIC would possess standing. If this court, however, determines the Smiths do have standing to assert their personal claims, then this court needs to determine if the Smiths' claims are essentially derivative. Any derivative claims means the FDIC must be joined as an indispensable party.

The Smith plaintiffs counter the FDIC's assertions with accusation that the FDIC's arguments are "not only incorrect but irrelevant." Pls.' Reply to FDIC's OSC Resp. at 1. The Smiths claim their derivative standing rests not on a damages claim for loss in value of NCF's stock, but on an equitable claim for restitution to recover the value of the benefit given to CFS in the merger. *Id.* The Smith plaintiffs also contend that if this court grants the FDIC standing they would be left without a remedy because the FDIC is required by statute to return any recovery to the United States. In the Smiths' words, "[t]his is not permitted by the *Winstar* line of cases, or by the Fifth Amendment, or by relevant general case law." *Id.* at 3.

Defendant does not offer a reply to the Smith plaintiffs' arguments and concentrates solely on the FDIC's claims for standing. Defendant agrees with the FDIC on one important point: the FDIC ultimately lacks standing. "The FDIC's response is correct on one important point: If shareholder plaintiffs lack privity to assert direct contract claims, then all plaintiffs' contract claims must be dismissed now." Pls.' Reply to FDIC's OSC Resp. at 26. Defendant argues the FDIC's proposed analysis for derivative standing is nothing more than a smoke screen designed to conceal the fundamental message – the FDIC lacks standing under the authority in this Circuit and the court should evaluate it separately from the Smiths' standing.

This court agrees. This issue has been resolved since *Landmark*. In *Landmark*, the FDIC intervened as a successor in interest on behalf of a failed thrift whose shareholders sued the United States for breach of contract. The court awarded the FDIC $17.7 million dollars in restitution, finding it to be the value of the benefit the failed thrift conferred on the government.

On appeal, the Federal Circuit focused on the discrepancy between the total amount of the government's claim against the total amount of the FDIC's recovery. "Even if the FDIC were to have won a judgment for the entire amount it was seeking, however, none of the money paid by the government in satisfaction of such a judgment would leave the government." *Landmark*, 256 F.3d at 1380. Consequently, no real adversity existed under the facts of the case between the FDIC and the government.

As a result, the FDIC did not possess standing because its damage claim against the United States did not constitute an Article III case or controversy since the amounts claimed were not in excess of what the thrift in this case owed the government. "[W]here the FDIC has not asserted claims for recovery in excess of what the failed thrift owes the government, the case-or-controversy requirement is not satisfied." *Landmark Land Co.*, 256 F.3d at 1382. *See Admiral Financial Corp. v. United States*, 329 F.3d 1372 (Fed. Cir. 2003)("the critical question is whether claims being asserted by the FDIC and claims being asserted by the plaintiff . . . total less than the government's priority claim arising from advances made to satisfy deposit liabilities of the failed thrift. If they do, the case-or-controversy requirement is not met and the FDIC lacks standing."). Simply put, the FDIC is not truly adverse to the government unless and until its own claim asserted on behalf of the thrift surpasses the amounts owed by the thrift to the government, which are primarily the insured outstanding deposit liabilities.

In this case, the FDIC and the United States are engaged in an intergovernmental dispute rather than a genuine Article III "case or controversy." As of December 31, 2001, the unpaid principal balance of the NCF receivership deficit is $136,396,351. Def.'s Consol. Brf. In Supp. of Motion to Dismiss Pls. for Lack of Standing

at 14; Def.'s Proposed Findings of Uncontroverted Facts at ¶¶ 54-55. As of December 31, 2002, the FDIC's claims total $41.7 million.

FDIC's Resp. to OSC, Ex. A, Rep. 3. Accordingly, pursuant to the *Landmark-Admiral* rationale, the FDIC lacks standing because its claims, even if coupled with the claims of the Smith plaintiffs, do not exceed the amount the NCF remains in arrears to the United States. As a result, the court finds the FDIC lacks standing to sue on its claim.

Conclusion

For the foregoing reasons, the Smith plaintiffs and the FDIC each lack standing to assert their respective claims against the United States. As a result, the Clerk of the Court is directed to enter judgment in favor of the United States. All other pending motions, being moot, are hereby DENIED.

IT IS SO ORDERED.

Lawrence J. Block, Judge

United States Court of Federal Claims

June 17, 2003

No. 92-540 C

O. BRUTON SMITH and HELEN W. SMITH,
Executrix for Plaintiff BILL SMITH,
Deceased,

Plaintiffs,

and

FEDERAL DEPOSIT INSURANCE CORPORATION,

Plaintiff-Intervenor,

versus

UNITED STATES OF AMERICA,

Defendant.

ORDER MEMORIALIZING GENERAL STATUS CONFERENCE

A recorded, court-initiated, telephonic general status conference pursuant, to RCFC 16 was conducted on Wednesday, July 16, 2003 to discuss the court's anticipated course of procedure for resolving the most recently-filed dispositive motion.

Pursuant to discussion during the conference (and for reasons reflected in a transcript), it is ORDERED as follows:

1) Plaintiff-Intervenor, FDIC, shall show cause why defendant's motion to dismiss FDIC's complaint for lack of standing should .not be granted in light of opinions issued by the U.S. Court of Appeals for the Federal Circuit and this court, including the decisions in *Hansen Bancorp v. United States*, 2003 WL 21267457

(Fed. Cir. 2003), *Admiral Financial Corp. v. United States*, 329 F.3d 1372 (Fed. Cir. 2003), *Castle v. United States*, 301 F.3d 1328 (Fed. Cir. 2002), *Glass v. United States*, 258 F.3d 1349 (Fed. Cir. 2001), and *Landmark Land Co., Inc. v. United States*, 256 F.3d 1365 (Fed. Cir. 2001). FDIC's ten-page-maximum, show cause response shall advance no new theories and shall be filed by Thursday, July 31, 2003, to which response defendant and plaintiff may seek leave of the court to file a reply.

2) Smith plaintiffs shall show cause why defendant's motion to dismiss their complaint for lack of standing should not be granted in light of opinions issued by the U.S. Court of Appeals for the Federal Circuit and this court, including the decisions in *Castle v. United States*, 301 F.3d 1328 (Fed. Cir. 2002), *Glass v. United States*, 258 F.3d 1349 (Fed. Cir. 2001), and *La Van v. United States*, 56 Fed. Cl. 580 (2003). Plaintiffs' ten-page-maximum, show cause response shall advance no new theories and shall be filed by Thursday, July 31, 2003, to which response defendant and FDIC may seek leave of the court to file a reply.

3) The parties shall file by Thursday, July 31, 2003 a joint appendix containing all of the transactional documents in this case with respect to the issue of whether the Smith plaintiffs have standing. *See Castle*, 301 F.3d at 1337 ("[O]nly Castle and Harlan have standing to sue for breach of the alleged contract because only Castle and Harlan signed any document constituting the alleged contract. The remaining shareholders are not parties."). The joint appendix shall also contain the corresponding documents from any one case that the parties agree most closely parallels this case on the issue of standing. With regard to the parties' respective show cause responses, they shall cite to the relevant tab and page numbers when referring to documents contained in the joint appendix.

4) The parties are encouraged to resolve this dispute by agreement, rather than litigation. To that end, the parties are to confer regarding the possibilities for a negotiated settlement. The court will be responsive to every suggestion by the parties that furthers this goal, and can offer resources to aid in settlement.

5) Defendant's motion filed on January 9, 2003 for leave to exceed page limitation in its reply to responses to its consolidated brief filed on November 27, 2002 is GRANTED. Accordingly, defendant's reply, which accompanied the motion, shall be filed forthwith.

6) Plaintiffs' motion filed on January 24, 2003 for leave to file a sur-reply to FDIC's response to defendant's consolidated brief is DEEMED TO BE MOOT.

7) Defendant's motion filed on June 6, 2003 for leave to file supplemental authority in support of its consolidated brief is GRANTED. Accordingly, defendant's supplemental authority, which was incorporated into its motion for leave to file is, DEEMED TO HAVE BEEN FILED along with the motion.

/s/ Lawrence J. Block
Lawrence J. Block
Judge

In the United States Court of Federal Claims

No. 92-540 C

FILED

OCT 23 2003

U.S. COURT OF
FEDERAL CLAIMS

O. BRUTON SMITH AND HELEN W. SMITH, EXECUTRIX FOR PLAINTIFF BILL SMITH, DECEASED,

Plaintiffs,

JUDGMENT

and

THE FEDERAL DEPOSIT INSURANCE CORPORATION,

Plaintiff-Intervenor,

v.

THE UNITED STATES,

Defendant.

Pursuant to the court's Published Opinion and Order, filed October 22, 2003,

IT IS ORDERED AND ADJUDGED this date, pursuant to Rule 58, that judgment is in favor of the defendant and the claims of plaintiffs and the FDIC are dismissed.

Brian Bishop
Acting Clerk of Court

October 23, 2003 By: /s/ Brian Bishop
Deputy Clerk

NOTE: As to appeal, 60 days from this date, see RCFC 58.1, re number of copies and listing of all plaintiffs. Filing fee is $105.00.

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04-5046

O. BRUTON SMITH and
HELEN W. SMITH, Executrix for Plaintiff Bill Smith, Deceased,

Plaintiffs-Appellants,

and

FEDERAL DEPOSIT INSURANCE CORPORATION,

Plaintiff,

v.

UNITED STATES,

Defendant-Appellee.

ORDER

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

ORDER

A petition for rehearing en banc having been filed by the APPELLANTS, and the matter having first been referred as a petition for rehearing to the panel that heard the appeal, and thereafter the petition for rehearing en banc having been referred to the circuit judges who are in regular active service,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same hereby is, DENIED and it is further

ORDERED that the petition for rehearing en banc be, and the same hereby is, DENIED.

The mandate of the court will issue on December 21, 2004.

FOR THE COURT,

Jan Horbaly
Clerk

Dated: December 14, 2004

cc: Gaston H. Gage
David M. Cohen
John F. Elmore

SMITH V US, 04-5046
(CFC – 92-540C)

****
* Note: Pursuant to Fed. Cir. R. 47.6, this order is not citable *
* as precedent. It is a public record. *
*
****

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

NOTICE OF ENTRY OF
JUDGMENT WITHOUT OPINION

JUDGMENT ENTERED: 10/06/04

The judgment of the court in your case was entered today pursuant to Rule 36. This Court affirmed the judgment or decision that was appealed. None of the relief sought in the appeal was granted. No opinion accompanied the judgment. The mandate will be issued in due course.

Information is also provided about petitions for rehearing and suggestions for rehearing en banc. The questions and answers are those frequently asked and answered by the Clerk's Office.

Costs are taxed against the Appellant(s) in favor of the Appellee(s) under Rule 39. The party entitled to costs is provided a bill of costs form and an instruction sheet with this notice.

The parties are encouraged to stipulate to the costs. A bill of costs will be presumed correct in the absence of a timely filed objection.

Costs are payable to the party awarded its costs. If costs are awarded to the government, they should be paid to the Treasurer of the United States. Where costs are awarded against the government, payment should be made to the person(s) designated under the governing statutes, the court's orders, and the parties' written settlement agreements. In cases between private parties, payment should be made to counsel for the party awarded costs or, if the party is not represented by counsel, to the party pro se. Payment of costs should not be sent to the court. Costs should be paid promptly.

Regarding exhibits and visual aids: Your attention is directed to FRAP 34(g) which states that the clerk may destroy or dispose of the exhibits if counsel does not reclaim them within a reasonable time after the clerk gives notice to remove them. (The clerk deems a reasonable time to be 15 days from the date the final mandate is issued.)

JAN HORBALY
Clerk

cc: GASTON H. GAGE
DAVID M. COHEN
JOHN F. ELMORE

SMITH V US, 04-5046
CFC –14 – 92-540C

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

CASE NO. 92-540C
(Judge Lawrence J. Block)

O. BRUTON SMITH and HELEN W. SMITH, Executrix for Plaintiff Bill Smith, Deceased,	)	
Plaintiffs,	)	
and	)	
FEDERAL DEPOSIT INSURANCE CORPORATION,	)	
Plaintiff-Intervenor,	)	
-vs.-	)	NOTICE OF APPEAL
THE UNITED STATES,	)	
Defendant.	)	

Notice is hereby given that O. Bruton Smith and Helen W. Smith, Executrix of the Estate of Bill Smith, deceased, Plaintiffs in the above-named case individually and derivatively, hereby appeal to the United States Court of Appeals for the Federal Circuit from the final judgment dismissing all claims entered in this action on the 23rd day of October, 2003.

This 12th day of December, 2003.

s/Gaston H. Gage
Gaston H. Gage
gastongage@parkerpoe.com
Counsel for Plaintiff O. Bruton Smith and Helen W. Smith, Executrix for Plaintiff Bill Smith, Deceased

CONFIDENTIAL: FILED UNDER SEAL

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

O. BRUTON SMITH and BILL SMITH,	)	
Plaintiffs,	)	
and	)	
FEDERAL DEPOSIT INSURANCE CORPORATION,	)	Case No. 92-540C (Chief Judge Smith) ("First 30" Case)
Plaintifff-Intervenor,	)	
v.	)	
UNITED STATES OF AMERICA,	)	
Defendant.	)	

DEFENDANT'S MOTION TO DISMISS COUNTS THREE THROUGH SEVEN OF SMITH PLAINTIFFS' SECOND AMENDED COMPLAINT, CROSS-MOTION FOR SUMMARY JUDGMENT

Defendant, the United States, respectfully requests the Court to grant summary judgment for defendant, pursuant to Rule 56 of the Rules of this Court, regarding the Contract liability claims of plaintiffs O. Bruton Smith and Bill Smith (collectively, "shareholder

plaintiffs"). Based upon the facts, largely taken from sworn declarations of the managing officers of the merging thrifts at issue, North Carolina Federal Savings and Loan Association ("N.C. Federal") and Carolina Federal Savings and Loan Association ("Carolina Federal"), admissions from shareholder plaintiff O. Bruton Smith, and contemporaneous documents, which cannot reasonably be disputed or rebutted, the Government is entitled to judgment in its favor. Accordingly, we further request that shareholder plaintiffs, "short form" motion for partial summary judgment as to contract liability, dated March 26, 1998, be denied. Additionally, because this Court lacks jurisdiction to entertain Courts Three and Seven of the second amended complaint ("Complaint"), and because plaintiffs, remaining claims (Courts Four, Five and Six) fail to state a claim for which relief may be granted, we request that shareholder plaintiffs, remaining counts be dismissed pursuant to Rule 12(b)(1) and (4) of the rules of this Court. In support of this motion, cross-motion, and opposition, we rely upon the record already established in this case and the following brief with appendix.

A44

April 23, 1982

Mr. H. Clark Goodwin
President
North Carolina Federal Savings and Loan
Association
P.O. Box 160
Albemarle North Carolina 28001

Application for Permission to Merge
and Maintain Branch Offices

North Carolina Federal Savings and Loan Association
Albemarle, North Carolina (FHLBB No. 5335)

INTO

Carolina Federal Savings and Loan Association
Raleigh, North Carolina (FHLBB No. 7414)

Dear Mr. Goodwin

We have considered the complete record and the merits of the subject application and have determined that such application can be approved pursuant to the provisions of Section 552.13 of the Rules and Regulations for the Federal Savings and Loan System. Since the merger has been negotiated and instituted for supervisory reasons, the notice requirements of Section 552.13(h) are not applicable.

Therefore, by virtue of the authority vested in me by Section 546.2(h) of the Federal Regulation., this application is hereby approved, subject to the following conditions:

1. That the proposed merger is effected in accordance with the provisions of Section 552.13(1) of the Federal Regulations;

2. That Federal Home Loan Bank Board approval of all applicable amendment, to the surviving institution. charter and bylaws is obtained prior to consummation of the merger: and

3. That Federal Home Loan Bank Board approval required under Section 563b.9(d) of the Rules and Regulations for

Insurance of Account. is obtained prior to consummation of the merger.

6. That North Carolina Federal Savings and Loan Association shall furnish analyses, within 120 days from the date of this letter. accompanied by a concurring opinion from its independent accountant., satisfactory to the Supervisory Agent of the Federal Home Loan Bank of Atlanta, which (a) specifically describe, as of the effective date of merger, any intangible assets, including goodwill, or discount of assets arising from the merger to be recorded on North Carolina Federal's books, and (b) substantiate the reasonableness of amounts attributed to intangible assets, including goodwill, and the discount of assets and the related amortization periods and method.

The certification of charter, certificate of insurance and certificate of membership in the Federal Home Loan Bank of Atlanta issued to North Carolina Federal Savings and Loan Association are cancelled as of the effective date of the merger. Therefore. we shall appreciate your forwarding these documents to us for cancellation after consummation of the merger.

If you bay. any questions, or if we nay be of assistance to you regarding this matter, please, contact us.

Sincerely,

Carl O. Kamp, Jr.
Principal Supervisory Agent

cc: Mr. R. A. Southerland
Carolina Federal. Savings and Loan Association

Raleigh, North Carolina

cc (struck out name – illegible)
DSG/sm
#16A A.21-A,23
cc: M. Rundle (handwritten)

.....

May 3 1982

FHLBB No. 5335

Mr. H. Clark Goodwin
President
North Carolina Federal Savings and Loan Association
P. O. Box 160
Albemarle North Carolina 28001

Dear Mr. Goodwin

In an effort to clarify the technical nature of the recently approved merger between Carolina Federal Savings and Loan Association and North Carolina Federal Savings and Loan Association, we have made four minor changes in our April 23, 1982 letter from President Kamp. The change are as follows:

1. North Carolina Federal Savings and Loan Association merges into Carolina Federal Savings and Loan Association – page 1.

2. Revised order of approval conditions – pages 1-2.

3. Approval to maintain branch offices of North Carolina Federal Savings and Loan Association – page 2.

4. Cancellation of North Carolina Federal Savings and Loan Association charter, certificate of insurance and certificate of membership in the Federal Hone Loan Bank of Atlanta – page 3.

Please replace Mr. Kamp's April 23, 1982, approval letter with the attached letter and return the former letter to this office.

Mr. Clark Goodwin
Page 2

We regret any inconvenience the above action may have caused the association. Thank you for your cooperation in this matter.

Sincerely;

s/ DG
David S. Coodson, Jr.
Supervisory Agent

cc: R. A.Southerland
Carolina Federal Saving and Loan Association
Raleigh, North Carolina

Len Volin
Attorney at Law
Washington, D.C.

cc: Mark Rundle
16A David A-26-27
DSG/sm

Federal Home Loan Bank **MEMO**

Received May 21, 1982
Office of the General Counsel
Division of Securities and Corporate Analysis

OFFICE OF EXAMINATIONS AND SUPERVISION
INTER-OFFICE COMMUNICATION

FROM Robert J. Moore
TO: Harry M. Zimmerman
of
Associate General Counsel

May 20, 1982
SUBJECT: Carolina FS&LA
Raleigh, North Carolina
FHLBB No. 7414
into
North Carolina FS&LA
Charlotte, NC
FHLBB No. 5335
Preliminary Proxies

We have substantially completed our review of the proposed merger of Carolina FS&LA into North Carolina FS&LA. We will complete our review and issue our final opinion upon receipt of the following:

1. Page 8 of the proxy statement states that the accounting treatment is in accordance with OES Memorandum SP—24. The accounting treatment should be in accordance with Generally Accepted Accounting Principles. The association's independent accountant agreed to make the necessary revisions.

2. Page 8 also indicates that $12,&3,000 of the goodwill, which represents 93% of the total goodwill, will be amortized over 40 years using the straight line method. OES's current position is that 40 years is considered unacceptable without a detailed analysis which supports the use of a 40 year amortization period. The association's independent accountant indicated that the association could justify the 40 year amortization period and that the supporting information would be forwarded immediately.

CONFIDENTIAL MATERIAL – SUBJECT TO PROTECTIVE ORDER
WOR934 0804

3. During our telephone discussions with Mr. Harry Kantarian, the association's attorney and Mr. Wallace Edge, Partner with Peat, Marwick & Mitchell, the association's independent accountant, (704-372-4300), we were informed that updated March 31, 1982 stub period information has been summarized for inclusion in the proxy statement. They agreed to furnish this office with black-lined page changes of the updated proxy statement.

There were no other significant accounting comments.

OGC OFFICIAL FILE

s/(illegible)
Deputy Director
Policy Programs

.....

Federal
Home Loan Bank

MEMO

Received May 26, 1982
Office of the General Counsel
Division of Securities and
Corporate Analysis

OFFICE OF EXAMINATIONS AND SUPERVISION
INTER-OFFICE COMMUNICATION

FROM Robert J. Moore May 26, 1982

TO: Harry M. Zimmerman SUBJECT: Carolina FS&LA
of

Associate General Counsel

Raleigh, North Carolina
FHLBB No. 7414
into
North Carolina FS&LA
Charlotte, NC

CONFIDENTIAL MATERIAL – SUBJECT TO PROTECTIVE ORDER
WOR934 0804

FHLBB No. 5335
Preliminary Proxies

We have completed our review of the proposed merger of North Carolina FS&LA and Carolina FS&LA of Raleigh. Based upon the satisfactory findings as a result of our initial review dated May 20, 1982 (copy attached), the additional information referred to in Peat, Marwick, Mitchell & Co.'s (PMM&Co.) letter dated May 20, 1982, and detailed discussions with Mr. Wallace Edge, PMM&Co. Partner, we conclude that the proposed merger application is in substantial compliance with OES's SP-24 and Generally Accepted Accounting Principles.

s/ Robert J. Moore
Deputy Director
Policy/Programs

Attachment

.....

FEDERAL HOME LOAN BANK BOARD

No. 82-391

Date: May 28, 1982

WHEREAS, North Carolina Federal Savings and Loan Association, Charlotte, North Carolina (the "Applicant"), filed on January 27, 1982, as amended on May 20, 21 and 24, 1982, with the Federal Savings and Loan Insurance Corporation (the "Corporation"), an application (the "Application") for approval to acquire all of the outstanding common stock of Carolina Federal Savings and Loan Association of Raleigh, Raleigh, North Carolina, pursuant to Section 563b.3(j)(4) of the Rules and Regulations for Insurance of Accounts (the "Insurance Regulations"): and

WHEREAS, the Federal Home Loan Bank Board, as the operating head of the Corporation, has determined that the Application is in accordance with Section 563b.3(j)(4) and other provisions of Part 563b of the Insurance Regulations:

NOW THEREFORE, IT IS RESOLVED, that the Application is hereby approved provided that the proposed transactions are effected as described in the Application.

By the Federal Home Loan Bank Board

s/ J. J. Finn
J. J. Finn
Secretary

.....

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

O. BRUTON SMITH and BILL SMITH	)	CASE NO. 92-540C
	)	
Plaintiffs,	)	(Chief Judge Smith,
	)	Managing Judge)
-vs.-	)	(Winstar-Related
	)	Claims)
THE UNITED STATES,	)	
	)	AFFIDAVIT OF O.
	)	BRUTON SMITH
Defendant.	)	

O. BRUTON SMITH, being first duly sworn, deposes and says that:

1. In 1981 and 1982, he was a substantial stockholder of the corporation then known as North Carolina Federal Savings and Loan Association ("Old N.C. Federal"). He owned on May 14, 1982, more than 8% of the outstanding shares entitled to vote on the Carolina Federal Savings and Loan Association ("Carolina Federal") acquisition and merger. Most of the Board members and officers of Old N.C. Federal during that period of time were also stockholders and owned a total of 6.52% of those shares on May 14, 1982, entitled to vote. The Board promptly informed the stockholders not on the Board of FHLBB's negotiations and promise of supervisory goodwill detailed below.

2. The shareholders in Old N.C. Federal learned that in 1981 Carolina Federal Savings and Loan Association ("Carolina Federal") had approached N.C. Federal to become a merger partner at the behest of the Federal Home Loan Bank Board ("FHLBB") and that negotiations had begun and were ongoing concerning the amount of supervisory goodwill that the surviving corporation, Carolina Federal, would have as determined by the purchase method and the length of the period of amortization of the goodwill that would be agreeable to FHLBB.

3. ...The Old N.C. Federal shareholders carried out their acquisition of all the shares of Carolina.

6. Plaintiffs and the other shareholder/investors in Old N.C. Federal did vote affirmatively for the merger described in Tabs 1-11 in reliance upon and acceptance of the FHLBB's promise of the

supervisory goodwill and upon the promise of the amortization period of 40 years. Their vote brought about their acquisition of Carolina Federal and the consummation of the Plan of Merger in the manner stipulated by FHLBB. Following the consummation of merger, he understood that he and the other stockholders had an agreement with the government as stockholders of Old N.C. Federal and as the new stockholders of Carolina Federal (New N.C. Federal) for supervisory goodwill as a regulatory asset determined by the purchase method of accounting which could be amortized over a period of 40 years. Upon that understanding, Carolina Federal, the resulting corporation, booked supervisory goodwill in the amount of $14,939,434.

7. According to his understanding and intent, his contract with the defendant includes the terms and conditions set out in the FHLBB letters and memoranda. The formation of his contract with the FHLBB was conditioned upon the requirement of voting for the plan of merger executed to by N.C. Federal and Carolina Federal and completing the acquisition of Carolina Federal. The shareholders of Old N.C. Federal and the FHLBB were parties to their own agreement for the supervisory goodwill forbearance not set out in the Plan of Merger. The acquisition of Carolina Federal was consummated in 1982 according to the Bank Board's approval and offer to contract. The stipulated supervisory goodwill was recorded on the books of New N.C. Federal and amortized at the 40 year rate with the knowledge and agreement of FHLBB until adoption of FIRREA. The government continuously honored its supervisory

goodwill contract until it breached and repudiated its duties under the contract in the adoption of FIRREA.

8. But for the government's supervisory goodwill promises, he would not have voted for the Old N.C. Federal stockholders' acquisition of Carolina Federal and the merger because the corporation of which he was a stockholder at that time had book value in excess of $15,000,000 and Carolina Federal was failing and essentially worthless; and he believes that a majority of the N.C. Federal stockholders would have likewise voted against the merger had they known they would not get the supervisory goodwill with an amortization period of 40 years as promised. To do the acquisition of Carolina Federal and the merger without the stipulated supervisory goodwill forbearance would have had a disastrous effect upon the adequacy of regulatory capital and would have destroyed the value of their stock.This 18th day of Mach, 1998.

s/ O. Bruton Smith
O. BRUTON SMITH

SWORN to before me and SUBSCRIBED
in my presence this 18th day of March, 1998.

s/ Sandra H. McDaniel
Notary Public

My Commission Expires: 6-30-2001

Affidavit of R.A. Southerland & H.C. Goodwin

AFFIDAVIT

The following statements, representations and declarations are made in support of the Ruling Request of the undersigned Associations as to the Federal income tax consequences resulting from the purchase of the stock of Carolina Federal Savings and Loan Association ("Carolina Federal") by North Carolina Federal Savings and Loan Association ("North Carolina Federal") and the subsequent merger of North Carolina Federal into Carolina Federal under section 368 (a) (1) (A), and related Sections[1], provided the merger complies with the federal regulatory laws applicable to the two associations.

1. Taking into account the North Carolina Federal stock held by dissenters, if any, the management of North Carolina Federal has no knowledge of any plan or intention on the part of its shareholders to sell or otherwise dispose of the Carolina Federal capital stock to be received in the proposed transaction which will reduce their ownership of Carolina Federal stock to a number of shares having, in the aggregate,a value of less than 50 percent of the value of all the North Carolina Federal stock outstanding immediately prior to the proposed transaction.

2. All sales, redemptions and other dispositions of stock to occur prior to or subsequent to the proposed transaction, which are part of the plan of reorganization, have been included in determining whether there is a 50% continuing interest through stock ownership as of the effective date of the transaction.

---

[1] All section references are to the Internal Revenue Code of 1954 as amended, unless otherwise indicated.

3. No cash will be received by the shareholders of North Carolina Federal in lieu of fractional shares of Carolina Federal, if any, received in the proposed transaction.

4. Carolina Federal will not furnish any consideration associated with the, purchase by North Carolina Federal of its stock.

5. Following the proposed transaction Carolina Federal will continue the business of North Carolina Federal in a substantially unchanged manner.

6. The liabilities of North Carolina Federal arose in the oridinary course of business and are associated with the assets transferred.

7. Carolina Federal has no plan or intention of disposing of any of the assets of North Carolina Federal, except in the ordinary course of business.

8. Neither North Carolina Federal nor Carolina Federal is an investment company as defined in Section 368 (a) (2) (F) (iii) and (iv).

9. The fair market value of the Carolina Federal capital stock to be received by each shareholder of North Carolina Federal who does not perfect his dissenters' rights will be approximately equal to the fair market value of the North Carolina Federal capital stock in exchange therefor.

10. There is no intercorporate indebtedness existing between North Carolina Federal and Carolina Federal, which was issued, acquired or will be settled at a discount.

11. North Carolina Federal, Carolina Federal and their shareholders will each pay their own expenses, if any, incurred in the proposed transaction.

12. The adjusted basis and market value of the assets of North Carolina Federal as a going concern will equal or exceed the sum of the liabilities assumed by- Carolina Federal and the amount of liabilities to which the property is subject.

13. It is represented that the Board, as defined in section 368 (a) (3) (D) (iii), has not made the certification described in section 368 (a) (3) (D) (ii), nor will such certification be made prior to or otherwise in connection with the proposed transact ion.

Under the penalties of perjury, the undersigned declare that we have examined the Ruling Request, including the accompanying materials of which this Affidavit is a part, and, to the best of our knowledge and belief, the facts presented, and the statements, representations and declarations made, in support of the Ruling Request are true, correct and accurate.

This Affidavit has been executed by duly-authorized officers of the undersigned Associations on this 28 day of December, 1981.

CAROLINA FEDERAL SAVINGS AND LOAN ASSOCIATION

BY: s/ R. A. Southerland
R. A. Southerland, President

NORTH CAROLINA FEDERAL SAVINGS AND LOAN

BY: s/ H. Clark Goodwin
H. Clark Goodwin, President

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

O. BRUTON SMITH and BILL SMITH, Plaintiffs, and FEDERAL DEPOSIT INSURANCE CORPORATION, Plaintiff-Intervenor, v. THE UNITED STATES, Defendant.	Case No. 92—540C (Chief Judge Smith, Managing Judge) (Winstar—Related Cases, Nos. 90—8C, et al.)

VIDEOTAPED DEPOSITION
OF
BILL SMITH

COPY

Held in Charlotte, North Carolina
On Wednesday, July 11, 2001

REPORTER: SALLY W. LOWRANCE, CVR

LOWRANCE REPORTING SERVICE, LLC
3335 Chilhain Place
Charlotte, North Carolina 28226
(704)543-7995 - (888)292-4528

Q. Are you referring to annual reports, things like that?

A. Pardon?

Q. Where have you read that North Carolina Federal represented that it had a contract with the government?

A. I don't think I ever did. I don't know whether I did or not. I don't know.

Q. Can you point me to any document issued by North Carolina Federal or anyone prior to the filing of your Complaint in this lawsuit that alleges that there was a contract between North Carolina Federal and the government?

A. A verbal contract's a contract, -isn't it?

Q. I take it your answer is no, you don't know where it's written down anywhere?

A. I don't know, no.

Q. And not just the contract itself ——

MR. GAGE: Objection. You're mischaracterizing his answer.

MR. FIREHOCK: I didn't characterize his answer.

MR. GAGE: You characterized it as being he didn't know of any contract. He said a verbal agreement is a contract.

MR. FIREHOCK: My question was whether it was written down.

Q. Mr. Smith, putting aside whether there was a verbal contract or not, are you aware of any writing prepared by anyone prior to the filing of your Complaint, let's say prior to 1990, that alleges that there was a contract between North Carolina Federal and the federal government? I don't mean the contract itself. I mean anything stating we have a contract?

A. I don't remember. I don't remember that.

Q. So to the best of your recollection, there is none, is that correct?

A. I just don't remember whether there was or not.

Q. But you don't positively recall any document saying that, do you?

MR. GAGE: Objection. Asked and answered.

Q. Go ahead, sir. You can't recall specifically any document that says that, can you, sir?

A. No more than stuff like this. That's a contract as far as I'm concerned.

Q. That description on page 8?

A. Yeah.

Q. Of the proxy statement?

Federal

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

O. BRUTON SMITH and BILL SMITH,

Plaintiffs,

and

FEDERAL DEPOSIT INSURANCE CORPORATION,

Plaintiff-Intervenor,

v.

THE UNITED STATES,

Defendant.

Case No. 92-540C

(Chief Judge Smith, Managing Judge)

(Winstar-Related Cases, Nos. 90-8C, et al.)

VIDEOTAPED DEPOSITION
OF
BILL SMITH

Held in Charlotte, North Carolina
On Wednesday, July 11, 2001

REPORTER: SALLY W. LOWRANCE, CVR

Charlotte, North Carolina 28226
(704)543-7995 - (888)292-4528

A. I'm sure I did. I'm sure I did. I used to read everything.
Q. Was there any discussion about the merger before you got this notice? Did you have any discussions with anyone about the merger?
A. Clark Goodwin.
Q. With Clark Goodwin?
A. Yeah.
Q. And what was the nature of that discussion?
A. Well, we talked about the merger. I was going to be a dissenting stockholder, and I went to Henry Dolby. And then word got out so Clark come to see me three or four times, come to office at the dealership.
Q. That's Clark Goodwin?
A. Clark Goodwin, yeah. And he come to see me three or four times trying to talk me out of it, and finally he got the job done. He was a better salesman than I was, I guess. So I voted for it, because if I hadn't voted for it, it would have never went through.
Q. In terms of the most stockholdings in North Carolina Federal, where were you? Did someone own more stock than you did?

A. No. Bruton Smith owned more, and I think Bain Jones owned more. He was on the board of directors.

Q. Did anybody else own more than you did?

A. Not as I know of.

Q. Who was Mr. Doby?

A. Henry Doby is an attorney in Albemarle.

Q. At some point in time, did your position on voting against the merger get to Mr. Goodwin?

A. Sure, it did, yeah.

Q. Did you tell him?

A. Yeah. He come to my office three or four times.

Q. And at that time you told him what?

A. That I was going to vote against it, and I was going to be a dissenting stockholder.

Q. Did you give him a reason why you wanted to vote --

A. Sure I did, yeah. I thought it was a bad deal.

Q. Why did you think it was a bad deal?

A. Well, $14 million blue sky going on the books is nothing as far as I'm concerned. You know, because I have money in the bank; you've got to have assets somewhere, you know.

Q. And what do you mean, blue sky?

A. Well, the $14 million they was going to give us, and he called it creative financing, they were going to give us to take over that savings and loan, to take

that troubled institution and the amortized goodwill over 40 years, you know.

Q. And who was going -- who did he say was going to give Mr. Smith you that?

A. The federal government, the RTC, non-RTC, the Home Loan Bank Board, I think, at that time. They changed it three or four times, but Mr. Goodwin, I think, was the chairman of -- the head of the Home Loan Bank Board, I think, at that -- I remember that name, but I don't know what time frame he was in there.

Q. What did Mr. Goodwin tell you could be done, if he told you anything, with that creative financing?

MR. FIREHOCK: Objection, hearsay.

MR. GAGE: I'm sorry, I didn't understand.

MR. FIREHOCK: Objection, hearsay.

Q. Okay, go ahead and answer the question.

A. Ask me again.

Q. What did Mr. Goodwin say to you about that creative financing, about how it could be used?

A. They put it on the books and amortized it over a period of 40 years, $14 million over a period of 40 years. That's what he called creative accounting, but I didn't think it was good accounting myself.

You know, I'm not as smart as some people in the government and so forth, but it looked like it was a bad deal to me, you know. That's the reason I wanted to get Henry Doby, and Clark kept coming. Four or

five times he was up there and kept talking to me about how good it was going to be and all this stuff, and -- but it didn't turn out that way.

Q. And the first several times he talked to you about it, what did you say to him?

A. I told him I was going to be a dissenting stockholder.

Q. And what changed your mind?

A. He did, and he kept telling me how good it was going to be and all this -- all this stuff. It was going to be good, and $14 million was going to be like an asset. It was going to be asset, which it did become an asset.

Q. And do you know how the $14 million was to be determined, how that figure was arrived at?

A. That was a premium they paid for Carolina Financial, or whatever that was, in Raleigh, over and above the book value.

Q. Over and above the book value?

A. I think that's right.

Q. Well, the first time you met with Mr. Goodwin, or he met with you, in your office, did you think the $14 million had any value?
A. No.
Q. Did Mr. Goodwin change your mind about that?

A. He did. I wouldn't have voted for it if he hadn't have changed my mind. If it hadn't been for the $14 million and the 40 years I would have never voted for the merger.
Q. You relied upon the $14 million and 40 years amortization --
A. Yeah, that's right.
Q. To vote for it?
A. -- absolutely.
Q. Would you look at page 8 of Plaintiffs' Deposition 1, please, sir, captioned "Accounting Treatment"?

MR. FIREHOCK: Mr. Gage, there's a mark on this page 8. Do you want to make a representation about whether that's your mark or whether it was on the original?

MR. GAGE: That's my mark. It was not on the original.

MR. FIREHOCK: Do you have any other marks on here besides the exhibit sticker?

MR. GAGE: I don't know of any other

marks.

MR. FIREHOCK: All right. I'll object to marking up the document.

MR. GAGE: What's that?

MR. FIREHOCK: I object to your marking

Mr. Smith 18

the document in this manner.

MR. GAGE: Oh, all right. Well, I will stipulate that the mark, the arrow, should be deleted.

Q. Do you see the caption "Accounting Treatment"?

A. Yes, sir.

Q. Have you read that?

A. Yes, I have.

Q. Did you read it at the time you got this --

A. I'm sure I did, but I don't remember it exactly, because I used to read all that stuff.

Q. Is this the accounting treatment that Mr. Goodwin explained to you in the meetings in your office that you've testified about?

A. That's right, yes, sir.

Q. And after Mr. Goodwin persuaded you, as you've testified, did you vote for the merger of N.C. Federal Savings and Loan?

A. Yes. Yes, sir.

Q. And Carolina Federal?
A. Yes, I did.
Q. Now, would you look at page 4, please, sir, of Deposition 1?
A. (Complies.) Yes, sir.
Q. And there is a caption, "The Merger"?

shares?
A. Well, we were -- they were buying institutions all over the country at two times book, so the market value should have been $44 a share.
Q. Times the number of shares?
A. Yes.
MR. FIREHOCK: Objection. Lack of foundation and leading.
Q. Aside from the $14 million creative accounting for the goodwill, do you know what the effect on North Carolina Federal Savings and Loan Association's financial strength was after the merger with Carolina Federal?
A. Yes. It kept shrinking. That's the reason I sued them. They lost $12 million after the merger. North Carolina Federal went down and lost $12 million -- $11 million, excuse me.
Q. Was that while Mr. Goodwin was president?

A. Yes, sir.
Q. And at the time of merger, did you know what would happen to the financial strength of the merged corporations because of the financial condition of Carolina Federal before the merger?
A. Well, we were told it was going to be a good thing. You know, Goodwin told me it was going to be a good

thing, convinced me it was going to be a good thing, but it turned out not to be.
Q. Did you vote for the merger of Carolina Federal and North Carolina Federal as a stockholder?
A. Yes.
Q. Would you have voted for the merger without the goodwill and amortization period as explained in this proxy statement to stockholders?
A. No, sir.
Q. Would you have voted for it without Mr. Goodwin's explanation of it to you?
A. No, sir.
Q. Was the merger completed?
A. Yes, sir.
Q. In voting for the merger, did you feel or state whether or not you felt that Federal Home Loan Bank Board was committed to you for the goodwill

amortization?

MR. FIREHOCK: Objection, leading.

Q. As explained to you?

A. Well, they made a promise. They give us $14 million dollars goodwill and 40 years to amortize it. That was a promise, and I thought, you know, the federal government tells you something, or an entity of the federal government, that you can take their word for

Q. Are you referring to annual reports, things like that?

A. Pardon?

Q. Where have you read that North Carolina Federal represented that it had a contract with the government?

A. I don't think I ever did. I don't know whether I did or not. I don't know.

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18 Q. And not just the contract itself --
19 MR. GAGE: Objection. You're
20 mischaracterizing his answer.
21 MR. FIREHOCK: I didn't characterize
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23 MR. GAGE: You characterized it as
24 being he didn't know of any contract. He said a
25 verbal agreement is a contract.

Deposition of FHLBB Chairman Richard T. Pratt (1981-82)

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prior to going to Washington, to the best of my recollection, I had no formal affiliation with the Bank Board or the system.

Q. Now, were you appointed to become the chairman of the Federal Home Loan Bank Board?

A. Yes.

Q. By whom?

A. Ronald Reagan.

Q. And you went through the confirmation process?

A That's correct.

Q. And when did you take over as head of the Federal Home Loan Bank Board?

A. I believe it was May of '8l but - early '81. I'm not sure.

Q. At that time can you describe for me the relationship between the Federal Home Loan Bank Board, when you were chairman, and the Federal Savings and Loan Insurance Corporation?

A. Yes. The Federal Savings and Loan Insurance Corporation could be described as the subsidiary or falling within the purview of the Federal Home Loan Bank Board.

The head of the Federal Savings and Loan Insurance Corporation, FSLIC, would be an

.....

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employee of-- an appointee of the chairman of the Home Loan Bank Board.

Q Did you appoint a chairman of FSLIC when you became chairman of the Home Loan Bank Board?

A Yes. I don't know who the chairman is,

but the operating head of FSLIC was H. Brent Beesley, who was appointed by me.

Q Had you known him from earlier lives?

A Not really. He was also from Utah and was recommended to me by someone from here, but I don't believe we had met prior to my contacting him concerning that position.

Q Separate and apart from FSLIC. were there supervisory functions that fell under the egis of the Federal Home Loan Bank Board?

A Yes.

Q What were those functions and were there heads of those functions?

A. As I recall - and, again, I have not attempted to maintain great currency on it or what it was, but if I remember correctly, the time I was there we had an office director who was the head of Examinations and Supervision. And that office would encompass both the examination of institutions to see that they met the prescribed standards, and

.....

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Q. When you arrived in Washington to take over your duties as head of the Federal Home Loan Bank Board as chairman, what was the status of the savings

and loan industry?

A. Well, it was in serious difficulty. A period of prolonged inflation had driven interest rates to very high levels, so the spread that was being earned by the institution and the cost of money had become or was about to become negative and the industry was in dire straits.

.....

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If you look at the real value as what they held as assets and the liabilities against them, I believe, again, in other testimony, we estimated that at the worst point in time they were something like $175 billion under water, This presented some formidable challenge too, as we had FSLIC with $170 billion of assets, which was as poorly structured as the savings and loan industry in general.

Q. $1.70 billion number of potentially being -

A. $170 billion

.....

Page 30

Q Was it important to you when you came in with the industry having losses in and being in a loss position to maintain the confidence of the investing public and the deposit public in the savings and loan

industry?

A. Absolutely, If that confidence was lost, the liabilities or the money being short term, would have left the institutions and would have caused liquidation of the industry and losses much bigger than the 170 billion at that time

So while we had substantial difficulties

.....

Page 43

And the acquiring institutions probably would have been reluctant to acquire the troubled institution without immediate benefit that was created by our using generally accepted accounting principals rather than RAP, for instance, RAP in the merger,

.....

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Q. Was it your belief that if an institution that was having difficulty could get assistance, that many of their problems would be resolved by a return or reduction in the interest rates at the time?

A. Yes. We felt there was a great core of institutions who were simply suffering from the economic shock of the interest rates and could be expected 10 have the managerial and financial talents to be successful under ordinary economic conditions.

Q. Are you aware of instances where financial assistance was given to institutions that were able to

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Q. Did you believe that the acquiring institutions that merged with failing thrifts were providing a service to the FSLIC and the Federal Home Loan Bank Board?

A. Absolutely.

Q. And was that service of value?

A. It was indispensable.

Q. Why was that, sir?

A. Well, the FSLIC simply did not have the resources nor did the agency have the resources. We had neither the resources to oversee institutions which we felt had inordinately weak management nor did we have the financial resources to resolve these in the traditional methods,

So as a result, the merger program became

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very much an extension of the Bank Board's staff in our attempt to move troubled institutions, both managerially and financially, into an institution that we had more confidence in and would require less resources of the Board, both in overseeing their

operations and of evaluating their management and also in the financial sense.

Q. Did you believe that the Federal Home Loan Bank Board staff and supervisory unassisted mergers had a greater role than just approving a mere application?

A. I don't recall. They have whatever role they desire. It's the same as where does an 800-pound gorilla sit? He sits wherever he wants.

So the senior staff anti the flank Board could have major influence on an unassisted merger through a myriad of avenues.

Q. And for the supervisory mergers they were responsible -- principally responsible for determining a method of resolving that issue?

A: That's correct.

MR. MANNING: We are making progress, Mr. Pratt. I'll ask the reporter to mark as Pratt Exhibit No. 10 a transcript from the Subcommittee on

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Q. If you could turn your attention to page 1499 at the top. There's a statement there that, "If interest rates in 1982 remain about where they are..."

A. Which page?

Q. 1499 at the top. Are you with me?

A. Yes.

Q. "If interest rates in '82 remain about where they are-and without factoring in industry restructuring or possible DIDC actions - some 400 associations will exhaust their capital accounts. Continuation of these rates through 1983 would result in another 500 institutions in this condition."

Do you recall making those calculations in early 1982?

A. I recall that we generally made calculations of that type and monitored the situation.

Home Loan Bank **MEMO** Office of the General Counsel

Inter-Office Communication

FROM Thomas P. Vartanian
TO: J. J. Finn
Secretary to the Board

May 26, 1982
SUBJECT: Application of North Carolina Federal Savings and Loan Association, Charlotte, North Carolina, to acquire the outstanding common stock of Carolina Federal Savings and Loan Association of Raleigh, Raleigh, North Carolina, pursuant to Section 563b.3(i)(4)

BACKGROUND

The proposed merger is being undertaken on a supervisory basis as a result of the deteriorating financial condition and operations of Carolina Federal. As of March 31, 1982, Carolina Federal's net worth approximated $931,900. According to the preliminary proxy material filed with the Board, based upon Carolina Federal's net loss of $383,094 for the quarter ended March 31, 1982, and assuming that Carolina Federal continued to incur additional losses at the same rate, Carolina Federal's net worth will be depleted during the latter part of 1982. Carolina Federal's common stock is registered under the Securities Exchange Act of 1934 ("the 1934 Act"). There is currently no active trading market for Carolina Federal's shares.

ANALYSIS

Upon a review of the application for approval, which incorporates by reference the preliminary proxy material filed with the Board, it has

been determined that a basis for denial does not exist for the following reasons:

(1) the proposed transactions are being effected on a supervisory basis and have been approved by the Principal Supervisory Agent;

(2) the terms of the proposed transactions have been represented as being negotiated at arms— length;

(3) Carolina Federal's board of directors and North Carolina Federal's board of directors have recommended approval of the proposed transactions and have indicated that in. their opinion the terms of the proposed transactions are fair to the stockholders of their respective associations;

(4) the proposed merger must be approved by a two-thirds vote of each associations outstanding shares;

(5) the shareholders of each association will have dissenters' rights under Section 552.14;

(6) the representations of the Applicant contained in its application indicate that the safeguards and restrictions contained in the conversion regulations will be maintained;

.....

The Agreement for Merger § 2.3.

2.3 *Effective Date.* The transactions contemplated by this Agreement shall become effective on such date (the Effective Date") as (i) all applicable legal requirements of this Agreement (including occurrence of the Closing as described in Section 2.2 of this Agreement) have been fulfilled, (ii) all conditions precedent which shall not have been waived have been satisfied and, (iii) the Bank Board shall declare the Merger effective. In order to cause the Bank Board to declare the Merger effective, both NCF and CFS shall submit the Merger to their respective shareholders at the earliest

possible time, not to exceed sixty (60) days from the date of Bank Board approval to the Merger, and upon their respective shareholder approvals to the Merger and satisfaction of all other conditions and obligations of this Agreement, to execute in duplicate Articles of Combination which shall be filed with the Bank Board's Office of the Secretary. NCF and CFS shall prepare a Notice of Special Meeting, Proxy Statement and related proxy material to be used in connection with their respective meetings of shareholders to vote to approve the Merger and each shall cooperate with the other in preparing such document and supplying any information concerning their business, operations and affairs as may be required or necessary for inclusion in the Proxy Statement.

.....

Deposition of Bryan H. Jones

Page 162

Q. Now, on page 11 of your report, sir, you conclude that the air market value of NC Federal is $22,300,150. Do you see that, sir?

A. Yah. Those statements are a little bit more complete than that.

Q. Okay. How do you define fair market value?

A. The price that a willing buyer and a willing seller would pay with any information they need about the transaction and neither one under compulsion to buy or sell.